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No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND APPENDIX.

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No._____

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OCTOBER TERM, 1959

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vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Clifford B. Dye, the Petitioner herein, prays that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of Michigan, affirming the conviction and sentence of Petitioner, by the Circuit Court for the County of Oakland, Michigan.

(References are to Appendix hereto, unless otherwise indicated. References to Appendix in State Court proceedings are marked "St. Ct. (a)" main appendix; "(b)" Prosecutor's appendix; or "(a)" appendix attached to Reply (236a ff)).

A.

REFERENCE TO OFFICIAL REPORTS:

The majority and minority opinions appear in 356 Mich. 271, are appended hereto.

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

(I). Petitioner was convicted by a jury in Oakland County Circuit Court March 1, 1956, sentenced to prison by the same Court on March 19, 1956. Upon leave granted, the Supreme Court of Michigan reviewed the case and filed an opinion, which confirmed the conviction and sentence, by a divided court June 5, 1959; three Judges for reversal, five for affirming the conviction and sentence.

(II). The Supreme Court of Michigan denied a motion for rehearing, timely applied for, on July 13, 1959 (173a). On July 17, 1959, it refused to admit Petitioner to bail, one justice dissenting. Application for bail was made to Honorable Potter Stewart, Associate Justice of this Court, and denied without opinion.

(III). The Statutory provision believed to confer jurisdiction on this Court are as follows:

Title 28, *United States Code, Annotated*, Sec. 1257, which provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(3) By writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the constitution * * *."

C.

QUESTIONS FOR REVIEW

1. Where information charged Petitioner with having committed the crime of assault with a dangerous weapon with intent to commit the crime of murder, on August 26, 1955 (St. Ct. 4a); and the Assistant Prosecuting Attorney representing the State of Michigan in the trial, with approval of the Court (117a-121a and 134a) deliberately and intentionally (133a) for the purpose of prejudice, asked questions and brought into evidence before the jury by wit-

nesses, cross-examination of Petitioner, and by his own statements, other serious crimes claimed to have been committed by the Petitioner which include: forgery (6a, 71a); felonious assault with a shotgun on other parties three years before (78a, 79a, 131a, 132a, 133a, 134a); a claimed assault on another occasion with a gun on a lawyer (101a and 123a); claimed fraud in connection with his application to practice law in Michigan (113a, 114a, 115a, 117a, 118a, 119a, 120a); bringing about the conviction of Petitioner of assault with intent to do great bodily harm less than the crime of murder; were Petitioner's rights to a fair trial, guaranteed by the Constitution of the United States, violated?

2. Where the Assistant Prosecuting Attorney in charge of the trial for the State of Michigan deliberately and intentionally made an opening statement filled with prejudicial, incompetent and collateral matters, the purpose of which was to attack the character of Petitioner, to make him out an evil man and thus convict him of the crime charged, not on the legitimate evidence, but by these prejudicial matters; and then for nine days of trial brought into evidence claimed prejudicial matters that would be collateral, which included claimed commission of other serious offenses set forth in question one, cross-examination indicating still other degrading and odious offenses for the same purpose (66a, 71a, 75a, 79a, 81a); in many instances this conduct of the Assistant Prosecuting Attorney being given dignity by the rulings and charge of the Court; the Petitioner's character not being an issue; was Petitioner accorded a fair trial as required by due process of law under the Constitution of the United States?

3. Where the Complainant gave no details on Direct Examination of how he was injured by a bullet, and the State's expert testimony showed that the only bullet which struck Complainant or his clothing had entered Complainant's body from twelve to eighteen inches from the end of the gun barrel, which expert testimony was entirely consistent with Petitioner's version of the discharge of the gun in self-defense, and accident, and the issue of Complainant being shot other than in self-defense or accident was deliberately brought into the case by the Complainant being put on the witness stand after the defense

had rested, in claimed rebuttal, at which time Complainant testified that he was shot when from eighteen to twenty feet away from petitioner in complete disregard of the circumstantial and expert testimony; was this manner of trial consistent with due process and a fair trial within the meaning of the Constitution of the United States?

4. Was there a disregard of the common law rules of evidence in Petitioner's trial, *e.g.*, the barring of Petitioner's testimony concerning previous acts of violence on the part of Complainant, of which Petitioner had knowledge, to substantiate his claim of fear of Complainant's violent and vicious disposition, in support of his defense of self-defense, in a prosecution for assault with intent to murder, so as to deprive Petitioner of the kind of trial to which he was entitled under the Constitution of the United States?

5. Did the instruction of the Court that *one can never take a life in self-defense*, and otherwise improperly instructing the Jury in regard to Petitioner's claim of self-defense, together with Court approval of admission of prejudicial evidence and Court approval of objections to proper evidence offered by the defense, deprive Petitioner of the right of self-defense in a prosecution for assault, where Petitioner was pursued and grappled with in his own barnyard by Complainant; and was Petitioner deprived of the right to the defense of self-defense, and other rights guaranteed him by the Constitution of the United States?

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provision involved is the Fourteenth Amendment to the *Constitution of the United States*, as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

During the trial, the Assistant Prosecutor cited as justification for his conduct Sec. 28.1050 *Mich. St. Ann.*, Sec. 768.27 *C. L.* '48, which appears in the Appendix hereto (88a); but which was not discussed by the Prosecutor in his Brief in the Michigan Supreme Court, nor in the opinions of the latter Court. It is not known whether this section will be involved in this Petition.

E.

CONCISE STATEMENT OF FACTS

Petitioner, a practicing attorney in the Village of Fenton, Genesee County, Michigan, was charged with assault with intent to murder; and convicted by a Jury of the included offense of assault with intent to do great bodily harm, less than the crime of murder, in the Oakland County (Pontiac) Circuit Court. He was sentenced to serve from two to ten years in Southern Michigan Prison. On leave granted, he appealed to the State Supreme Court and his conviction was affirmed by a divided Court.

The facts pertaining to the alleged assault, as contended for by Petitioner, and largely set forth in the minority opinion (including excerpts from the record), were as follows:

Complainant Clark was 27 years old, over six feet tall, and known to have been of a vicious and violent nature (157a), Petitioner was 54 years old, and suffering from heart and lung trouble (157a). On May 7, 1955, Clark had made a vicious assault on Petitioner, and choked him into near unconsciousness. The State Police saw the marks on Petitioner's body (157a).

Shortly thereafter Petitioner obtained an Injunction from the Oakland County Circuit Court (157a), enjoining Complainant Clark from assaulting, molesting, threatening or interfering with Petitioner (157a), and from coming on Petitioner's sister's property, the property where Petitioner lived (St. Ct. 57a), adjoining the farm upon which said Clark lived, and rented from Petitioner's sister. This Injunction was in full force and effect when Clark allegedly was assaulted in Petitioner's own farmyard.

On August 26, 1955, Petitioner complained to Harvey Lodge, Clark's attorney, of the violation of other portions of the Injunction. Mr. Lodge phoned Clark's wife, Lois (St. Ct. 66a), who told Clark of the conversation (St. Ct. 66a).

Shortly thereafter, and despite the Injunction, Clark, with his wife and children drove to Petitioner's farm (157a), apparently for the purpose of attacking Petitioner.

When Petitioner was standing at the Northeast corner of the barn, Complainant Clark was at the Southeast corner, 42 feet away (St. Ct. 123a, 124a); Petitioner claimed Complainant started after him on the run and pursued Petitioner around the corner and up the hill on the North side of the barn to a gate where Complainant caught and grappled Petitioner to the ground (St. Ct. 126a), (The State Court record has picture exhibits showing the People's claim of distance, etc. as testified to by Lois Clark, wife of Complainant (St. Ct. 210a, Exhibits 3 through 9),) while Petitioner was retreating sideways, according to Lois Clark's testimony on the preliminary examination; backwards, according to her testimony at the trial (162a). Clark finally caught up to Petitioner when he was slowed down by heart pains (St. Ct. 124a, 126a) and a gate which opened the wrong way; and was grappled with between the barn and his home (41a).

Before Petitioner retreated, according to his testimony (St. Ct. 124a), he remembered a small pistol in his work clothes (St. Ct. 124a), which he shot once into the ground (160a). Clark and his wife agree that the first shot was not fired at Clark (10a, 130a).

Petitioner further testified that when the two grappled, Petitioner fell; that the gun was discharged acidentally, firing the only shot which entered Clark's clothing or body (163a, 164a). Two bullets were left in the gun.

Petitioner testified that he threw the gun away from the two men, and Mrs. Clark picked up the gun and refused to give it to Clark, so Clark would not shoot Petitioner (107a). Mrs. Clark admitted she got the gun (13a).

The Assistant Prosecutor did not put in Complainant's version of the shooting until Complainant was recalled on the People's rebuttal. At this time, Clark testified positively that he was shot in the stomach by Petitioner when they were 18 *feet* apart (162a).

However, on the People's case in chief, the State Police expert had already testified that the only bullet which entered Clark's person or clothing was shot from 12 to 18 *inches* from the end of the gun; based upon laboratory analysis (163a-164a).

The immense volume of prejudicial and collateral innuendo, questioning, and evidence injected into the trial by the Assistant Prosecuting Attorney, which three of the Justices said deprived Petitioner of the fair and impartial trial which the Constitution and Laws of the State of Michigan guaranteed him, are set forth in part in the dissenting opinion (157a), in part in the appendix (1a ff), and discussed to some extent in Division H hereof; as are the other tactics and conduct of the trial by reason of which Petitioner believes himself to have been deprived of due process and a fair trial.

And Petitioner contends that he was tried for several unrelated criminal offenses set forth in point 1 besides the charge upon which he had been informed.

F.

ISSUES RAISED IN STATE COURT

The question of Petitioner's rights were, to a large extent, raised during the course of the trial, as each violation of his rights occurred by objections; in various motions for mistrial (91a) [1], in the motion for directed verdict (50a); and in the briefs on the appeal.

Footnote [1]. As will appear in the Argument, the individual instances of prejudicial and collateral matter are numerous and cumulative; and therefore, instances are presented, within the limits of a Petition, in the Appendix. In most instances, objections or protests were made by trial counsel.

Assignments of error are abolished in Michigan, being raised by the brief. For the reasons mentioned in the Argument, reference thereto is not being made here.

It was passed upon affirmatively by the three dissenting Justices in the State Supreme Court, as noted in the opinion (166a); and negatively by the majority of five (151a).

Finally the Petition for Rehearing included a direct claim that the Petitioner's rights under the Federal Constitution had been violated (last page thereof).

The sufficiency of raising and presenting the facts upon which Petitioner's claim of violation of his rights under the Federal Constitution are discussed further at the end of Division H hereof.

H.

ARGUMENT

Three of the most experienced Justices of the Michigan Supreme Court, in their dissenting opinion, after reviewing the conflicting evidence regarding the shooting, said (165a):

> "A grave and serious question as to whether the State had met this test" (to prove absence of self-defense) "was presented to the jury for determination. Under these conditions, the duty rested squarely on the State to guard against prejudicial remarks and questions, or the introduction of improper collateral evidence. This duty was not met, and, on the contrary, the record discloses that every effort by collateral attack and improper questions was made by the State to discredit and belittle the Defendant."

The minority detailed some of the objectionable portions of the trial (165a ff); and then quoted *People vs. Lieska*, 161 Mich. 630, 638 "with approval", as follows (166a):

> "'We are constrained to say that the respondent did not have that fair and impartial trial which the Constitution and laws of this state guarantee him.'"

After citing the law and the facts herein further, the minority said (167a):

> "We agree with defendant's statement 'that the respondent was prevented from having a fair trial

because of the injection of prejudicial innuendo and evidence concerning irrelevant, incompetent, immaterial and collateral matters that were prejudicial to the respondent and that included remarks in the People's opening statement and continued throughout the trial and in the final argument.'"

The trial was conducted by Mr. Taylor, Chief Assistant Prosecuting Attorney. While he was nominally under the control of the Prosecuting Attorney in the Circuit Court, and the Attorney General in the State Supreme Court, The trial and appellate proceedings were directed entirely by Mr. Taylor; and the result represents his idea alone of a fair trial. The Attorney General at the time the trial and application for leave to appeal was filed, became a Justice of the Supreme Court, and voted with the majority.

4. PETITIONER WAS TRIED UPON SEVERAL CHARGES AT ONCE.

1. Petitioner was tried on several other charges, than the one included in the Information.

On the State's Rebuttal, Mr. Taylor said:

> "MR. TAYLOR: I might state my reason, my opening statement to the Jury, and we propose to show and do show on the occasion of August 26th that that was not the first time Mr. Dye had resorted to the use of guns and since it is connected with the case, it is material and relevant as to similar acts to show intent, plans, scheme, design under Sec. 28.1050. * * *" (Referring to *Mich. St. Ann.*) (133a).

The foregoing remark was made in connection with an incident about three years previous, allegedly involving Billie Striffow and Don Hansard. Billie Striffow was called to the stand on rebuttal and asked preliminary questions. The Defendant's attorney objected on the ground of materiality, it not being proper rebuttal, and the witness' name not being endorsed on the Information.

The Court said, in front of the Jury.

"THE COURT: In the discretion of the Court, the witness may testify. * * *" (134a).

The Jury was then excused. While Billie Striffow was not examined further, the Jury was left with the impression that the testimony was both material and damaging, by the remark to the Jury:

"THE COURT: * * * The Court rules that his testimony would be competent if it followed the lines that Mr. Taylor has suggested * * * but * * * I would have to permit further rebuttal on (Petitioner's) part * * * In order to avoid the delay and expedite the trial, Mr. Taylor has agreed to withdraw the witness" (134a).

The other alleged witness to the alleged incident, Don Hansard, was never produced, but Mr. Taylor said, in front of the Jury:

"MR. TAYLOR: If the Court please, Mr. Hansard was subpoenaed and he has been here almost every day. We have been looking for him, calling him on the telephone. He is a very important witness. * * *" (131a).

Thus, in effect, Petitioner was tried for an alleged assault with a deadly weapon (no one claims to have been shot), three years prior to the incident for which he was being tried.

Basis was laid by Mr. Taylor's questions to Petitioner:

"Q. Do you know Don Hansard * * * do you recall here within the last year or two of a man being on your lake on your property and of going down there and saying 'Get off my lake * * * You'd better get off because I'm going to do some target practicing right away' and that bullets started to go all around him in the lake and he got off?" (77a).

"Q. If this Don Hansard stated that you told him that you were going to do some target practicing * * * that would be untrue?" (78a).

"Q. The fact is that on most of the occasions when you want your way you take a gun with you, don't you, Mr. Dye?" (79a).

As to another alleged incident, the Assistant Prosecutor asked Petitioner (77a):

> "Well, * * * do you know two boys, Carl Elliott and Allen Curtain who was upon your lake and you came at them with a shotgun and said you didn't want them fishing on that lake?"

The boys were identified, and apparently in the court room, and the Jury was left with the impression that if they could be called, this other alleged incident could have been proved.

The Assistant Prosecutor also accused Petitioner of assault with a gun, supposedly in Petitioner's brief case, while talking with Defendant's Attorney, Mr. Lodge.

> "Q. And you reached down on the floor and picked up that brief case while you were seated in front of Mr. Lodge and you put your hand in there and you took it out again three times, did you have a gun in that brief case? * * *" (101a).

Despite Petitioner's denial, upon rebuttal, Mr. Lodge was called to the stand, and asked questions and gave answers which seemed to prove this charge (although Lodge never saw any gun):

> "Q. Did he — What did he do if anything with that bag more than once, if you can recall, in your office?
>
> A. Well, I know he reached in and out of it two or three times" (123a).

Thus Petitioner was *tried* for the offense of threatening Lodge with a gun.

Next Petitioner was tried upon a charge of perpetrating a fraud on the Michigan State Bar in his application for admission to practice in Michigan. Petitioner was questioned about an unverified letter from someone, which was found in the files of the State Supreme Court, giving different years for his term as magistrate than what Petitioner gave in his testimony. Then Mr. Taylor asked:

"Q. But if you did send them in to the State Bar and at that time you knew it were not true, you were in fact perpetrating a fraud on the State Bar of Michigan" (115a).

Although this was clearly a collateral matter, Mr. Taylor proceeded to *try* Petitioner for this alleged fraud, by calling as his first witness on rebuttal the Clerk of the Supreme Court of Michigan (117a). The trial court permitted this testimony. All the Clerk could say was that he found the letter in the Court file (118a). No one knows who made the error in dates. But the ruling of the trial court, and the testimony of Mr. Winters, made this a *trial* of Petitioner on this alleged fraud.

On cross-examination, Petitioner was asked:

"Q. Do you remember going over with one of those checks and asking Mrs. Clark here to forge your sister's name to that check so you could cash it?" (71a).

In connection with this, Mr. Taylor attempted to try Petitioner on a charge of attempted forgery by asking Mrs. Clark:

"Q. Was there anything else that occurred about these milk checks? Were you ever asked to endorse a milk check?" (6a). * * *

"A. Mr. Dye asked me. He says, 'Why don't you sign my sister's name on the milk check?' and I said 'No.'" * * * (6a).

LAW APPLICABLE — TRIAL OF OTHER ALLEGED CRIMES

As to all of the foregoing, the holding of *People vs. Deitz*, 86 Mich. 419, applies. If the questions asked of Petitioner referred to immaterial things, the Assistant Prosecutor was bound by his answers. If they applied to material matters, they were not the proper subject of rebuttal testimony.

In *Boyd vs. U. S.*, 35 L. Ed. 1077, 12 S. Ct. 292, 142 U. S.

451, on a trial for murder, it was held improper to show that the Defendant had recently committed robberies; either for identification or other purposes. The same ruling under the same facts was made in *People vs. Padgett*, 306 Mich. 545, 556, decided subsequent to enactment of the statute relied upon by the Assistant Prosecutor in his arguments to the trial court (28.1050 of *M. S. A.*) (88a).(2)

Other cases, holding that it is improper to require Petitioner to defend himself against several unrelated offenses at once, are *People vs. Minney*, 155 Mich. 534, 539. In *Urban vs. State*, 253 S. W. 2d 38 (Tex. 1952), the Court said:

> "The general rule in all English speaking jurisdictions is that evidence of other and extraneous crimes by the accused is not admissible, because the accused is entitled to be tried upon the accusations made in the (information), and not on some collateral crime, or for being a criminal generally. This rule is now deemed axiomatic and is followed in all jurisdictions," (citing *Boyd vs. U. S., supra*).

In *Gillespie's Michigan Criminal Law and Procedure*, 2d Ed., page 548, the author said:

> "* * * It is not proper however to compel the Respondent on cross-examination to answer questions irrelevant to the issue which have a tendency to bring in other charges. Whatever latitude is proper to test veracity, it cannot properly introduce independent issues against the person who is both witness and respondent"; citing *People vs. Kelsey*, 303 Mich. 715, and other cases.

Footnote (2) This section was referred to several times in the trial, but was not cited in the State Supreme Court, either in the People's Brief, or the majority opinion. If relied upon in this Court by the State, Petitioner will argue that it was not intended to apply to any of the situations herein; and that the interpretation sought to be placed upon it would be unconstitutional.

Other cases following the above rules are: *Bunn vs. State*, 184 Pac. (2d) 621 (Okl. 1947); *O'Neal vs. State*, 291 Pac. (2d) 375; *Helton vs. U. S.*, 221 F. (2d) 335; *State vs. Hyde*, 136 S. W. 316, 331 (Mo.); *Acres vs. Commonwealth*, 259 S. W. (2d) 38 (Ky. 1953); and *People vs. Channell* 288 Pac. (2d) 326 (Cal. 1955), citing text book authority. To same effect, *Wharton, Criminal Evidence*, Vol. 1, page 56; 62 *L. R. A.* 350; *Wigmore*, 3d. Ed., Sec. 180.

In *People vs. Gotshall*, 123 Mich. 474, cross-examination by the Prosecutor designed to convey to the jury the impression that the prosecuting officer believed defendant was guilty of other arsons was held reversible error. And in *People vs. Willson*, 205 Mich. 28, 39, it was held that collateral offenses claimed to have been committed by Defendant himself, cannot be cross-examined upon.

In *Massei vs. U. S.*, 241 Fed. (2d) 895, affirmed on other grounds, 78 S. Ct. 491, 355 U. S. 595, the court said:

> "It cannot be shown that accused has committed other similar crimes to show that he has committed the one charged." (Citing cases).

To the same effect, *O'Dell vs. U. S.*, 251 Fed. (2d) 704.

References to prior convictions was held to deprive Defendant of constitutional and impartial trial, where character was not an issue, *People vs. Lyons*, 303 Pac. (2d) 329 (Cal. 1956). It was held error to show unrelated crimes or misconduct, *People vs. Donaldson*, 134 N. E. (2d) 776; or prior troubles with the law; *Benton vs. U. S.*, 233 Fed. (2d) 491; or previous convictions, *U. S. vs. Tomaito*, 249 Fed. (2d) 683.

Improper use of extrinsic evidence to show other crimes, denies Defendant a fair trial, *People vs. Mancini*, 170 N.Y.S. (2d) 844, 5 A. D. 2d 841.

There are hundreds of cases which hold that it is improper to show unrelated alleged crimes; but our research has not disclosed a case where it has been necessary for the Federal Courts to reverse or review state courts on this point. This, no doubt, comes about because the state court has always reversed in situations such as we have here. It therefore falls under the classification that a violation of well-recognized common law rules of evidence and procedure and fair play amounts to want of due process; as

discussed in citations at point 2 and beginning of point 3 hereof. The rights denied Petitioner here brought about his conviction and were as important to him as the right to counsel, rights deprived where a conviction is obtained by perjured testimony, rights deprived where material testimony is fraudulently suppressed; all of which rights have been established in cases in this court hereinafter cited.

2. INJECTION OF PREJUDICIAL, COLLATERAL AND IMMATERIAL MATTERS BY ASSISTANT PROSECUTOR THROUGH QUESTIONS AND INNUENDO; AND APPARENT APPROVAL BY TRIAL COURT.

Petitioner contends that throughout 9 days of trial, beginning with his opening statement, throughout the evidence, and ending with his final argument, the Assistant Prosecutor injected through questions and innuendo, prejudicial, collateral and immaterial matters to the point, as held by the minority, that Petitioner was denied a fair trial. Further, as appears in the record and instructions (135a), the trial court gave dignity to some of this and permitted much of it. What the Court did technically prohibit, was done in such a weak manner as not to curb the Assistant Prosecutor nor enlighten the Jury; and often the Court admitted a line of questioning after having previously excluded it.

OPENING STATEMENT OF ASSISTANT PROSECUTING ATTORNEY

The opening statement of the Assistant Prosecutor (1a) disclosed his plan of interjecting incompetent, collateral and prejudicial matters. He began with a discussion of relationships long before any dispute arose between Petitioner and Complainant (1a). He discussed at length the financial difficulties between Petitioner and Complainant (1a-2a), disregarding, as will be discussed hereafter, the status and determination of the litigation between them; and representing Petitioner as scheming to get everything away from the Clarks (5a). He said Mr. Dye got the cattle, he got the farm and the Clarks are in debt. He then discussed matters which occurred long after the al-

leged assault, including ads run by Petitioner (5a), and the settlement of the accounting suit (5a). The Assistant Prosecutor stated that three statements were given by Mrs. Clark (4a) and he incorrectly claimed that Petitioner would give no information to the police and other authorities discussed hereafter (4a). He also accused Petitioner of seeking to keep Complainant from obtaining an attorney (3a). And he discussed alleged difficulties between Petitioner and a colored neighbor (5a).

The following shows and classifies some of the grossest errors and examples of prejudicial, collateral and immaterial matters. From the Assistant Prosecutor's opening statement, and the other material shown in the Appendix and herein, it is evident that the Assistant Prosecutor spent a great deal of time in advance of trial in delving into these prejudicial and unrelated matters; thereby demonstrating a long planned scheme of violating Petitioner's constitutional rights.

CLAIMS OF ALLEGED UNRELATED CLAIMS AND MISDOINGS

The Assistant Prosecuting Attorney, by questioning and innuendo, accused the Petitioner of many acts which would have been crimes, or would have seemed such to a lay Jury; and many misdoings, all totally unrelated to the offense charged, and prejudicial to fair trial.

It was insinuated that Petitioner had been convicted of a crime, although the Assistant Prosecutor must have known that Petitioner had no criminal record. In questioning him about his gun permit, the Assistant Prosecutor asked:

> "Q. I call your attention specifically to this application * * * 'Have you ever been convicted of a felony or adjudged insane', that you did not answer that question and at the time you filled that in that you intentionally did not answer that question"? (75a).

He continued questioning along this line for several questions; whether or not Petitioner had been convicted of a crime (76a, 68a).

It was developed and admitted that, since Petitioner's divorce, all the property was in his sister's name, including possibly some which had been in Petitioner's name (70a).

It was insinuated, first, that this was done to defraud the United States Government of income tax; a crime (71a, 165a).

It was also insinuated that this was done to defraud Petitioner's ex-wife or wives (86a, 6a).

> "(Florida real estate) * * * was not put in your wife's name but was put in your sister's name" (86a).

After the Court expressed uncertainty about his ruling and Petitioner requested permission to explain his answer, Mr. Taylor said:

> "Q. All right, Mr. Dye * * * if you don't want to answer it, o. k." (90a).

It was also insinuated that this was done to defraud creditors. Mr. Taylor said:

> "There are several (reasons for his questions) to show that the general trend of Mr. Dye throughout this entire transaction has been one whereby he has been looking out for Dye, that this property belonged to Dye; that he kept it from creditors, and that it goes to the intent" (7a).

Taylor specifically asked:

> "Q. Isn't it a fact, Mr. Dye, that it would be absolutely impossible for Mr. Clark to ever sue you and get a nickel out of you * * * because you haven't anything that could be attached?" (90a).

Mr. Taylor asked witness Reginald Crawford (28a):

> "Q. Did he (Petitioner) tell you that he would fix him good (Complainant) with a gun?"
>
> "A. No."

On objection made, the Jury was instructed to disregard this (28a). But Mr. Taylor said (28a):

> "Anything that is improper the Court can order stricken;"

showing that he intended to offer incompetent and prejudicial matters in front of the Jury, and rely upon the Court protecting him by formal rulings striking the testimony.

In his final argument, Mr. Taylor accused Petitioner of having misled the County Gun Board (148a, 149a).

The Assistant Prosecutor even went into an argument between Petitioner and a farmer over $10.00, and presented it in such a way as to make it appear that Petitioner was trying to defraud the farmer. He asked Petitioner:

> "* * * Why did you try to force him (Sitkowiak) to take a thirty-dollar check when you knew positively that forty dollars was owing" (111a).

The Assistant Prosecutor asked Petitioner about alleged cross words with the Holly Fire Department (93a); all of which was entirely collateral and prejudicial.

FILES AND PLEADINGS OF CHANCERY AND LAW ACTIONS BETWEEN PETITIONER AND COMPLAINANT INTRODUCED IN EVIDENCE BY THE ASSISTANT PROSECUTING ATTORNEY AND SUBMITTED TO THE JURY. FOR THE PURPOSE OF CREATING PREJUDICE AGAINST PETITIONER

The lease by which Complainant and his wife were occupying a farm was introduced in evidence (St. Ct. 11a) as Exhibit 1, and all of the financial arrangements and lawsuits between the parties were gone into; beginning with the opening statement (1a, 2a), and accounting between the parties.

The Assistant Prosecuting Attorney deliberately represented Petitioner as scheming and oppressive toward Complainant; and, to further create an image in the minds of the Jury that Petitioner was an evil and despicable man, introduced court files of chancery and law suits between the Petitioner and Complainant, and twisted the facts and issues in the lawsuits to that end.

He asked Complainant:

"Q. Isn't it true, every week of every month there was a new paper served on you by Mr. Dye?

A. There was papers served on us constantly" (20a).

He read to the Jury a part of the decree which decree had been stipulated to by the Complainant and his attorney and entered on the 25th day of November, 1955, nearly three months after the claimed offenses (21a, 22a). The Assistant Prosecuting Attorney could have no other purpose for bringing in this file and decree but to further prejudice Petitioner. He said in his opening statement:

"• • • Mr. Dye got the cattle, he got the farm and the Clarks are in debt" (5a).

Ignoring the decree and the fact that each party got what the court ordered and what they agreed to and received through process of law, the financial, legal relation and lawsuits between the parties were used and twisted by the Assistant Prosecuting Attorney for the purpose of creating sympathy with the Jury for the Complainant and his family and prejudice against the Petitioner.

Likewise, the file in an assault and battery case wherein the Petitioner was the plaintiff and the Complainant Clark was the defendant, growing out of the assault of May 7, 1955, was introduced in evidence, and the declaration read to the Jury (25a, 26a, 27a). This was done by the Assistant Prosecuting Attorney to further prejudice the Jury against Petitioner. All of these matters had no place in the trial of Petitioner for the crime charged in the Information.

The Assistant Prosecuting Attorney did these things deliberately and with the intention of creating prejudice as above claimed. The following is his statement:

"• • • It is my intention to show that Dye's interest was in getting all of the property at any time from anybody that he possibly could" (7a).

And on cross-examination, he asked Petitioner:

> "Q. Isn't it a fact that that is exactly what you started this suit to get these people off the farm, that now you had a hundred head of cattle there and the farm was paying and you didn't want these people to have their half-share did you?" (94a).
>
> "Q. Mr. Lodge told you * * * you have cut off the Clark's income * * * I returned fifty dollars (of his fees) to them to feed their two small children?" (100a).

Mr. Lodge was called on rebuttal and asked about this alleged refund of attorney fees (122a).

Taylor further asked Petitioner:

> "Q. Didn't he (Lodge) further say and wasn't it your exact motive that if you could get this injunction to keep these people from feeding those cattle that then you could squeeze them right into a settlement, without further delay? Answer yes or no" (100a).

Complainant and his wife claimed, on Taylor's leading questions, that many papers or legal documents had been served on them (29a, 20a), presumably proving that Petitioner was oppressive.

To bring in all of these pleadings and issues before the Jury on the claim of "motive", when there is nothing therein which could possibly be ascribed as a motive for murder, deliberate tactics of this kind disregarded Petitioner's rights to a fair trial of the issues actually involved, and thus the Assistant Prosecuting Attorney again, deprived Petitioner of due process under the United States Constitution.

INQUIRY INTO PETITIONER'S PRIOR MARRIAGES

The Assistant Prosecutor repeatedly inquired into Petitioner's previous marriages. Mr. Taylor asked:

> "Where did the first marriage take place, Mr. Dye?" (69a).

After objections, Mr. Taylor said:

> "I don't see what is wrong with marriage, if the Court please" (69a).

Objections were sustained (69a). But then Mr. Taylor asked about the second marriage, to a Michigan woman, and his stepchildren (82a). Then he offered the bill of complaint for divorce into evidence (84a).

And Mr. Taylor asked Petitioner if he had not been married five times (108a).

Early in the trial (8a) the Court excluded from consideration marital difficulties *before* the lease (8a); indicating that such difficulties after the lease were competent. Nevertheless, Mr. Taylor repeatedly returned to Petitioner's matrimonial difficulties (as noted above).

Even in his final argument, he alluded to it indirectly, by discussing Clark and his "only wife" (149a, 150a).

Going into Petitioner's marriages and divorces, even to the point of reading from the pleadings filed by others than the Petitioner (86a), further shows that the Assistant Prosecuting Attorney deliberately and intentionally went into any matter, competent, relevant or not, for the purpose of prejudice, and thus violated Petitioner's right to a fair trial and due process.

UNWARRANTED REFLECTIONS ON PETITIONER'S PROFESSIONAL STANDING

The minority opinion stated that Mr. Taylor belittled Petitioner (165a).

The Assistant Prosecuting Attorney subtly twisted Petitioner's conduct in the practice of law to prejudice and inflame the Jury against Petitioner.

He did this in part by intimating, as discussed hereinbefore, that the Petitioner was using his legal experience

to squeeze Complainant out of his lease. He also asked:

> "* * * You know it is one of the fundamental known rules of our profession, Mr. Dye, not to interfere with another attorney's client."
>
> "Q. Then do you deny that you told Mr. Clark that if he did not get rid of his attorney that you would certainly see to it that he paid dearly?" (109a).

Mr. Lodge was asked about this, and said he could answer yes or no (123a).

Mr. Taylor repeatedly referred to Petitioner as "Lawyer Dye", (cf. opening statement 3a) although that is not a familiar usage around here.

He also asked:

> "Q. The fact is that in Louisville you were generally known as 'I am the law Dye', isn't that true?" (66a).

Mr. Donald J. Bremer, a former associate and defense witness, was asked by Mr. Taylor:

> "Q. Weren't you invited by Mr. Dye to come to his office so he could teach you the type of negligence law that he has been practicing?" (53a).

The insinuation was that there was something wrong about the "type" of law that Petitioner had been practicing. This unwarranted action on the part of the Assistant Prosecuting Attorney could have only one purpose, to inflame and prejudice the Jury against Petitioner in regard to matters having no place in the case.

Petitioner was even asked by Mr. Taylor:

> "Q. Has anyone told you, Mr. Dye, that you have a persecution complex?" (96a).

which is about as "belittling" a remark as one could make.

COMMENTS AS TO MAKING STATEMENT TO AUTHORITIES

Mr. Taylor consistently commented before the Jury on the alleged fact that Petitioner had never made a statement in regard to the events of August 26, 1955 (3a), although the Court had apparently excluded the answer (62a).

Despite these assertions, Petitioner had told officer Barkell that Clark was trying to kill him (15a). When asked to go to the scene, he said he was too tired; but that Mr. Bremer, whom he had previously talked with would do so. No doubt Petitioner was tired from wrestling with Clark, in an attempt to save his life. There is no intimation in Barkell's testimony that the conversation was limited to the foregoing, nor that Petitioner was unwilling to talk freely.

Some of the Assistant Prosecutor's comments and questions regarding his improper and incorrect claim that Petitioner had given no statement follow:

In opening statement:

> "He refused to tell them (the officers) the time of day" (3a).

Of Donald J. Bremer:

> "Q. In your police work, Mr. Bremer, generally did you find that when you went out to investigate, that people generally told you what happened? * * *. And if they refused to give you any version, did you arrive at any conclusion in your mind?" (56a).

When objection was made, Mr. Taylor withdrew the question, a favorite tactic of his, after getting improper insinuations to the Jury (56a).

> "Q. And this is the first time in six months that you have made known to the People * * *" (61a).
>
> "Q. * * * On August 26th from that stand you have testified today that this man here made a murderous assault upon your person and you never or wouldn't make any complaint to the Police until today?"
>
> "A. I told you."
>
> "Q. You never told me anything" (80a).

This was an unsworn statement based upon the Assistant Prosecutor's alleged personal knowledge, presented to the Jury, upon Mr. Taylor's integrity as a public official.

> "A. I sure did Mr. Taylor * * *" (80a).
>
> "A. That's right. That's what I told you Mr. Taylor. I told you other things, Mr. Taylor, before today" (80a).
>
> MR. TAYLOR: "If you have I must have been deaf because I never knew what happened until today" (80a).
>
> MR. TAYLOR: "I didn't say 'Testify'. This is the first time he told any law enforcing officers as to what happened that night" (62a).

The deliberate and intentional action of the Assistant Prosecuting Attorney violated the Petitioner's rights under the Fifth Amendment of the United States Constitution, as is more clearly shown in the case of *People vs. Peterson*, 177 N. Y. S. 2d 510 (Ct. of Appeals, 1958), which case holds: It is, of course, within a Defendant's rights not to disclose his defense to the police authorities; and reference to such failure is reversible error.

APPEAL TO SECTIONAL AND RACIAL PREJUDICE

Racial and sectional prejudice are not one sided. There are people in Michigan who are resentful of people coming from the south and taking jobs or practicing their professions. And there is sometimes dislike by negroes of white southerners. These prejudices were exploited so skillfully by Mr. Taylor, that they are difficult to show in the record. However, these were deliberately brought into the case by lengthy examination referred to above, events which allegedly happened in Kenfucky many years before the events upon which the prosecution were based; or even before the parties involved were acquainted. We submit they were gone into for no other purpose than to appeal to this prejudice.

There was one negro juror. In his opening statement Mr. Taylor said:

> "* * * (Petitioner) entered the barn of another man without any consent or authority of these other colored people * * *" (5a).

On the trial, a colored witness was put on the stand and asked about the alleged incident just mentioned (45a). Further, this witness was permitted to say what a good man Complainant is; not an issue in the case (47a), although he knew nothing whatever about the alleged shooting (47a).

MATTERS REMOTE IN TIME OR MATERIALITY

As indicated at the beginning of the argument under this point, the Assistant Prosecutor went into the legal and business relations of Petitioner and Complainant which occurred long before the night in question (1a). He also went into matters occurring after the night of the alleged assault, which could not possibly have any bearing on the feelings or relationships between Complainant and Petitioner; or upon the conduct of the parties on that night.

For example, there was lengthy questioning, both of the People's witnesses (24a) and of Petitioner, as to advertisements run by Petitioner in connection with the apparent theft of his livestock; long after the night in question (104a).

Likewise, the pleadings in the suit brought by Petitioner against Clark arising from Clark's assault upon Petitioner on May 7, 1955 were read at length (26a).

The introduction of the whole file in the chancery suit (19a) and the reading to the Jury by Mr. Taylor, the Assistant Prosecuting Attorney, of a settlement of this suit between Petitioner and Complainant Clark (21a, 22a), even though the agreement and settlement was made one day less than three months after the claimed offense charged in the Information, could be for only one purpose, to further prejudice the Jury against Petitioner by Incompetent and immaterial matters.

OTHER PREJUDICIAL MATTERS

Mr. Taylor asked Petitioner:

> "Q. • • • You did not go there or take up this position with this particular company in any way so it would alleviate you from any draft call did you?" (81a).

Mr. Taylor said:

> "If you can give me the formula to get the answers from Mr. Dye, I'll proceed in any manner you want me to" (96a).
>
> "Browbeating you. That would be funny" (99a).
>
> "Q. Do you know that some of the people in Holly were going around snuffing their noses?" (105a).

We submit that it was apparent from the Assistant Prosecutor's opening statement that he intended to convict Petitioner, not on the facts, but from all kinds of character assassination; attacking him from every conceivable angle; with complete disregard of materiality, competency, or the rules of evidence.

Thus question after question, day after day, was consumed by incompetent matters calculated to inflame and prejudice the Jury against Petitioner, and draw attention away from the fatal defects of the State's case; as shown by their own expert witnesses.

The purported ground was "motive", or, sometimes, "intent". But Petitioner did not seek Complainant out. It was the other way around; Clark having come on Petitioner's property, in violation of an Injunction, for the apparent purpose of again brutally beating Petitioner.

The only issues before the Jury should have been what happened on the night of August 26, 1955. This issue was lost sight of and the Petitioner was convicted by the incompetent, immaterial and prejudicial matters beginning with the opening statement and continuing for nine days of trial (See Point 5 hereinafter).

We respectfully refer the Court to our Appendix, where page after page of this prejudicial and collateral matter is set forth.

LAW APPLICABLE — DUTY OF PROSECUTOR

The Prosecuting Attorney is a quasi-judicial officer; particularly in a state like Michigan, where he also acts as the grand jury, in signing informations; *Meister vs. People*, 31 Mich. 99; *Sneed vs. People*, 38 Mich. 248; *People vs. Hurst*, 41 Mich. 328; *People vs. Bemis*, 51 Mich. 422. His Chief Assistant stands in his place, shares these duties and obligations.

When a Jury hears the Prosecutor insinuate the existence of facts, it assumes that they must be true, and that only technical rules of evidence prevent the facts from being put in evidence. And, in a long trial like this, the Jury is likely to be confused and mistake positive statements of the Prosecutor for evidence in the case.

It was stated by this court in the case of *Mooney vs. Holohan*, 294 U. S. 103, 79 L. Ed. 791, at page 112:

> "• • • The Attorney General states that if the acts or omissions of a prosecuting attorney 'have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* (italics theirs) in a denial of due process of law.' And, 'conversely,' the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied.'
>
> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert v. Louisiana, 272 U. S. 312, 316, 317,

71 L. ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581.

"Reasoning from the premise that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. Frank v. Mangum, 237 U. S. 309, 335, 59 L. ed. 969, 983, 35 S. Ct. 582; Moore v. Dempsey, 261 U. S. 86, 90, 91, 67 L. ed. 543, 545, 546, 43 S. Ct. 265."

As said in *Berger vs. U. S.*, 295 U. S. 78, 79, 79 L. Ed. 1314:

"The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. * * *

"The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially * * * and whose interest * * * in a criminal prosecution is * * * that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer * * * he is not at liberty to strike foul (blows) * * *

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. * * *

"Judgment reversed."

People vs. Lieska, 161 Mich. 630, 638, involving insinuations as to the credibility of Defendant's witnesses, was quoted by the minority herein as authority for the proposition that such tactics deprive Defendant of the fair and impartial trial guaranteed him by the Constitution and Laws of Michigan (166a). In that case, the Michigan Court said:

"Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and non-partisan, and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent. As was said in *People v. Cahoon, supra,*" (88 Mich. 456). "these questions and insinuations reflected upon the character of the witnesses. The prosecuting attorney has no right to discredit the witness by innuendo."

Other cases where improper insinuations or statements or arguments of the Prosecutor have been held reversible error, in most instances despite absence of objections, are: *People vs. Dane*, 59 Mich. 550; *People vs. Ignofo*, 315 Mich.

626; *People vs. Holmes*, 292 Mich. 212; *People vs. Kelsey*, 303 Mich. 715.

Improper final argument by District Attorney was held ground for reversal in *Viereck vs. U. S.*, 318 U. S. 236, 87 L. Ed. 731, citing *Berger vs. U. S.*, *supra*.

And improper remarks of the Prosecutor were held to deprive Defendant of due process, in *Lowery vs. State*, 108 So. 351 (Ala. 1926).

In *People vs. Derbert*, 71 Pac. 564, misconduct of prosecutor in questioning, leaving impression of Defendant being guilty of other crimes, held reversible error. And questioning of Defendant, as to collateral matters, was held inflammatory, and ground for reversal, *People vs. Dee*, 142 N. E. (2d) 811, 14 Ill. App. (2d) 96.

PREJUDICIAL MATTERS

The injection of prejudicial matters into a trial for assault, affray, etc., was discussed in *Commonwealth of Penna. vs. Truit, et al*, 369 Pa. 72, 85 A2d 425, 30 *A. L. R.* (2d) 572; commenting that:

> "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man . . . ."

The prejudicial matter was testimony that the union was allegedly communist-dominated. The Court commented that it was the duty of the Court to protect the Respondent from such prejudicial matter, even though there was a question as to whether objection had been timely made by Defendant's attorneys.

CHARACTER NEVER IN ISSUE EVEN UNDER GUISE OF "CREDIBILITY"

Not only did the Assistant Prosecutor improperly begin his case, and continue to the end, with an improper attack on Petitioner's character; but his character never became a proper issue in the case, because no character testimony was offered by him; and specific acts cannot in any event be relied upon.

In *People, vs. Minney*, 155 Mich. 534, 540, the Court quoted with approval the following:

> "* * * (1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character; (2) it is not permitted to show the Defendant's bad character by showing particular acts: (3) it is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged; (4) it is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial *other than such as is expressed in the foregoing three propositions.*'" (Emphasis supplied).

We submit that improper evidence cannot be introduced by calling it "credibility". In *People vs. Deitz*, 86 Mich. 419, 426, the Prosecutor asked a witness about some trouble between Defendant and other parties; which the trial court admitted; but the Supreme Court said was improper. Defendant was asked about it by his counsel and denied it. The People sought to introduce rebuttal witnesses. The State Supreme Court said that the Prosecutor could not use this testimony on rebuttal if material, nor by way of impeachment, if immaterial.

PROPER WAY OF INQUIRING AS TO CONVICTION

It is proper, before a character witness is asked if a Defendant has been convicted of a crime, to excuse the Jury

and ask if the witness has knowledge of such a conviction, *Michelson vs. U. S.*, 93 L. Ed. 168, 335 U. S. 469 (footnote). In the same manner, we submit, the Assistant Prosecutor should have been required to state, out of the presence of the Jury, as to whether he knew of any felony, before being permitted to ask the Defendant if he had, or insinuate that he had, been convicted.

WANT OF DUE PROCESS — CRITERIA

The cases cited hereinafter, and in the footnote hereto [3], establish the jurisdiction of this Court over State Courts, where the fundamentals of fairness and law have not been followed in substance and procedure. *Lyons vs. Oklahoma*, 88 L. Ed. 1481, 322 U. S. 596-7, contains by way of dictum, the definition of due process as "fundamental principles of liberty and justice."

From *Rochin vs. People of the State of California*, 252 U. S. 165, 96 L. Ed. 183; 25 *A.L.R.* (2d) 1396:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' *Malinski v. New York*, supra (324 U. S. at 416, 417, 89 L. Ed. 1039, 65 S. Ct. 781). These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitu-

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Footnote [3] *Irvin v. Dowd*, 79 S. Ct. 825, 2 L. Ed. (2d) 900; *Cash v. Culver*, 79 S. Ct. 432 (citing many cases) 3 L. Ed. (2d) 557; *Spano v. People of State of New York*, 79 S. Ct. 1202; *Payne v. State of Arkansas*, 78 S. Ct. 844, 356 U. S. 560; *Ciucci v. State of Illinois*, 356 U. S. 571; *In re Oliver*, 333 U. S. 257; opinions of Mr. Justice Harlan, *Keith v. New York*, 3 L. Ed. (2d) 974, and *Eckworth v. New York*, 3 L. Ed. (2d) 25, 79 S. Ct. 755, staying execution.

tional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A. L. R. 575, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U. S. 319, 325, 82 L. ed. 288, 292, 58 S. Ct. 149."

"The requirement of the 14th amendment is for a fair trial," *Massey vs. Moore*, 75 S. Ct. 145, 99 L. Ed. 135, 348 U. S. 105. The words "elementary standards of justice" appear in *Irvine vs. California*, 74 S. Ct. 381, 98 L. Ed. 561, 347 U. S. 128; "fundamental conceptions of justice," concurring and dissenting opinions in *Taylor vs. Ala.*, 68 S. Ct. 1415, 335 U. S. 252, 92 L. Ed. 1935.

We submit that these rules apply to this situation, the deliberate abuse by the Assistant Prosecuting Attorney of his office, and his disregard of the Petitioner's rights. *Malinski vs. New York*, 89 L. Ed. 1029, 324 U. S. 401, mentions, among other grounds for reversal, "indefensible remarks of the prosecutor."

In *Alcorta vs. Texas*, 3 L. Ed. (2d) 9, 78 S. Ct. 103, 355 U. S. 28, the Prosecutor told the witness not to volunteer certain testimony (that he had intercourse with the Defendant's husband); which resulted in the Jury not obtaining information which would have borne on malice aforethought, and the death sentence. Remanded to state court for new trial. Annotation as to due process on perjured testimony (Federal Court) 2 L. Ed. (2d) 1575.

Misconduct of the prosecutor, in procuring a fraudulent transcript, was the basis of the decision in *Cheesman vs. Teets*, 76 S. Ct. 34, 100 L. Ed. 4, 350 U. S. 3; certiorari granted, remanded to District Court.

Use of perjured testimony by the prosecuting officials in *Hawk vs. Olson*, 90 L. Ed. 61, 326 U. S. 271-279, was ground for certiorari. Perjury by police officials as to number of statements made by Complainant, was held want of due process; *Curran vs. Del.*, 259 F. (2d) 707.

3. WITHHOLDING PRINCIPAL TESTIMONY UNTIL REBUTTAL — CONCLUSIVENESS OF EXPERT TESTIMONY IN CORROBORATING PETITIONER.

"Due process" means a trial according to the established rules of practice in criminal trials, including those as to the admission of evidence; 16A *C. J. S.* 659; *Anderson vs. State*, 126 Pac. 840; 846; 8 Okl. Cr. 90. It means "fundamental fairness" in the proceedings; *Webb v. State*, 278 S. W. (2d) 158, 160, citing *Lisenba vs. People*, 314 U. S. 219, 86 L. Ed. 166; *U. S. vs. Hiatt*, 141 F. (2d) 664 (citing opinions of the U. S. Supreme Court).

We submit that the Assistant Prosecutor violated the rules of fairness by withholding his principal testimony until rebuttal; and thereby overcoming the effect of the People's own expert testimony, fully corroborating Petitioner, and disproving the truth of Complainant's testimony.

In his original examination, the Assistant Prosecutor asked of the Complainant only who shot him and when — no other details (33a).

Defendant's attorney asked Mr. Taylor while Clark was on the stand, during the case-in-chief.

> "(By Mr. Smith): If you want to put your witness back on the stand and ask him about the shooting or whatever you want to, I haven't any objection to that."
>
> MR. TAYLOR: "If the Court please, we are not on that particular subject now. * * *" (49a).

However, he was never asked anything more until the rebuttal.

Petitioner's attorney did attempt to obtain from Complainant some of the details, but the Assistant Prosecutor asked for a recess at this point (41a). On re-cross-examination Clark testified that he did not know when he was shot, or whether it was just the bullets whizzing by (130a). He testified on original cross-examination he did not feel any pains until he was grappling with Petitioner (42a).

However, on rebuttal, direct testimony, he stated that he was bleeding, knew he was shot when he and Petitioner were 18 feet apart (127a).

Petitioner's testimony (minority opinion 160a) was that he shot twice into the ground. The third shot was fired when the two were grappling and Clark tried to make Petitioner shoot himself. The fourth shot was accidentally discharged when Petitioner had fallen to the ground with Clark over him.

Petitioner's testimony was fully corroborated, and that of Complainant disproved, by the testimony of the People's police expert witness (St. Ct. 45a-49a) and minority opinion (163a-164a) that the only bullet which entered Clark's clothing *or* person entered from 12 to 18 *inches* from the end of the gun.

Even Mrs. Clark, upon whose testimony the Assistant Prosecutor relied in his case-in-chief, testified that she thought one shot was fired while the men were wrestling (162a, 12a), although, after a recess, she developed some doubts (12a). And Complainant Clark, when first on the stand, said he did not know whether the gun was discharged when the men were wrestling (41a).

The Assistant Prosecutor must have known what his principal witness, the man claimed to have been assaulted, would testify as to the details of the alleged shooting. Even if he did not, he owed it to Petitioner to ask in the case in chief. Nevertheless, he deliberately waited until the rebuttal to ask Clark's version. Clark testified positively on rebuttal that he was shot from 15 to 18 *feet* distance by Petitioner; contrary to the above expert testimony (163a, 129a).

Only the Petitioner and Clark know whether Clark was shot, or shot at, from a distance; and the expert testimony shows that it was Petitioner who was telling the truth.

While we cannot exactly say that this falls under the cases of perjured testimony, the Assistant Prosecutor permitted Clark to testify about this vital matter to what was either false or mistaken, and with complete disregard as to which it was.

In *People vs. Crump*, 5 Ill. (2d) 251, 52 *A. L. R.* (2d) 834, 125 N E. (2d) 615 the Court said:

> "• • • However, • • • the prosecution ought not, with knowledge of important testimony at its command, close its case without introducing it and then, after the defendant has introduced his testimony, be

permitted to open up its case anew and introduce evidence in chief which it could have produced at the proper time but withheld. * * *"

The same criticism applies to several of the witnesses called on rebuttal (even if their testimony had otherwise been proper); particularly Billie Striffow; and the Court's comments; see point 1 hereinabove. See *People vs. Dietz*, 86 Mich. 419, 426, discussed elsewhere herein.

We submit that, when expert evidence of a technical nature is introduced; Judges, understanding its significance more fully; should carefully explain its meaning to the Jury; and, if the Jury is still mislead, direct a judgment in accordance with modern scientific methods and jurisprudence.

A Defendant is entitled to the protection of the judge's superior knowledge and understanding, even though there is a Jury. Where the evidence does not rise to the standard required to establish guilt, it is the duty of the Court to direct an acquittal; *People vs. Lewdon*, 153 N. Y. 10, 46 N. E. 1046; *People vs. Gadson*, 348 Mich. 307; *People vs. Collins*, 322 Mich. 319; *People vs. Lennon*, 71 Mich. 298; and *People vs. Smith*, 217 Mich. 669. Defendant was entitled to a directed verdict at the close of People's case in chief; as the evidence then stood; and, we submit, at the close of the case.

4. VIOLATION OF RULES OF EVIDENCE

4. The majority opinion was contrary to the well-recognized right of the Defendant to testify as to acts of violence, on the part of the Complainant and information conveyed to him by others in regard to acts of violence of the Complainant, in order to show his state of mind in connection with his claim of self-defense (155a). Such testimony was offered and excluded (56a-59a).

The admissibility of this evidence had been established in *People vs. Farrel*, 137 Mich. 127, 130, citing *People vs. Harris*, 95 Mich. 87, 90.

The majority opinion tacitly conceded that this was error (155a), but said that Petitioner had "gotten the idea across". If he had "gotten the idea across", the Jury would have acquitted Petitioner on the ground that he acted from real fear; unless it was mislead by the instruc-

tions of the Court (point 5 hereof); or unless it was swayed by the mass of prejudicial error mentioned under points 1 and 2 hereof. The majority opinion begged the question, and, in effect, held that the conviction was valid, no matter how obtained.

5. RIGHT OF SELF-DEFENSE DENIED TO PETITIONER BY CHARGE OF COURT

5. The instructions of the trial judge failed to protect the Defendant. They not only compounded the errors mentioned in point 1 and 2 hereof, by discussing them as validly in the case; but they were misleading and erroneous concerning the Petitioner's rights to self-defense; as well as containing many errors of fact; as will be seen by the entire record.

Although the majority described the instructions as "carefully prepared", they contained the word "killing" (instead of assault (144a). Paragraphs 28 and 29 cover self-defense. They read, in part, as follows (144a):

> "A plea of self-defense is under certain circumstances a good defense. To make the plea available, it must appear that the respondent was without fault on his part. If he himself was the aggressor in the conflict, he cannot invoke the doctrine of self-defense as an *excuse for the killing* unless he was at that time in immediate danger of losing his own life or suffering some grievous bodily injury and there was no retreat open for him and his only safety lay in striking the blow * * * Self-defense in proper cases is the right of every person *but it will not justify the taking of human life* * * * and the jurors must be satisfied * * * that the Defendant * * * was without fault * * * that there must have been no way open whereby he could have retreated * * *" (Emphasis supplied).

In other words, the Court's charge was that, no matter how great the danger to Petitioner's life, he could not take the life of Clark in self-defense. Supposedly, if he intended to kill in self-defense, he would be guilty as charged; so the Jury was instructed.

The right to kill in defense of one's person or property, on his own property without retreating, has long been rec-

ognized in prosecutions for homicide; *Beard vs. U. S.*, 158 U. S. 550, 39 L. Ed. 1086; holding that in such case the Defendant is not required to retreat. Also, *cf.* 26 *Am. Jur.* 264; *Black's Law Dictionary*, "curtilage". And, in his own curtilage, he may kill, even though he does not consider his life in danger; *Brownell vs. People*, 38 Mich. 732, 738.

The doctrine of "retreat to the wall" is considered as obsolete, inhumane and impractical; *Brown vs. U. S.*, 256 U. S. 335, 18 *A. L. R.* 1276, 65 L. Ed. 961, 41 S. Ct. 501; particularly when Defendant is suddenly assailed by a larger man, 4 *Am. Jur.* 151 and 251; 3 *Gillespie Mich. Criminal Law* (2d Ed.) 2043; citing *People vs. Doe*, 1 Mich. 451.

The trial judge therefore gave an erroneous charge as to the Petitioner's right to take life; and an erroneous charge as to the duty to retreat to the wall; or he gave one which was so confusing that neither the Jury then, nor counsel now, can determine what rights and limitations were involved in Petitioner's claim to self-defense. As to constitutional effects of erroneous charge, see footnote (9).

Footnote (9) That a completely erroneous charge may be want of due process, is indicated, perhaps negatively, in *Lyons v. California*, 64 S. Ct. 1208, 88 L. Ed. 1481, 332 U. S. 596-607, in which the majority held that the charge was correct under the state law (which it is not, here); and, the minority, that the charge failed to protect the Defendant.

In *Andres v. U. S.*, 92 L. Ed. 1055, 333 U. S. 740-770, it was held that, at least in capital cases, doubt as to the sufficiency of the charges should be resolved in favor of the Defendant.

In *Cole v. Arkansas*, 68 S. Ct. 514, 92 L. Ed. 644, 333 U. S. 196, the court charged the Jury under the wrong section of the statute, and it was held lack of due process. To same effect, *Carty v. U. S.*, 190 F. (2d) 99. Where conflicting instructions are given (if any part of the instructions are correct), it is presumed that the Jury will follow the erroneous instruction; *People v. DeWitt*, 233 Mich. 222, 226 (citing other cases).

In *Gerds v. State*, 64 So. (2d) 915 (Fla.) it was held that the state and Federal constitution included the right to have the court "correctly and intelligently instruct the jury." To same effect, *State v. Collins*, 115 N. E. (2d) 844.

The effect of the court's erroneous charge to the Jury, taken together with his approval of incompetent evidence and rejection of material and competent evidence offered by the defense along with the vast amount of prejudicial error brought into the case by the deliberate and intentional conduct of the Assistant Prosecuting Attorney, took away from the Petitioner his defense of self-defense; and thus deprived him of a fair trial and due process of law.

It was held that the charge, together with the evidence, may amount to a deprivation of due process; *Fisher vs. Kansas*, 71 L. Ed. 1108, 274 U. S. 380.

The Appendix hereto showing about 20% of the transcript, therefore demonstrates some of the gross errors of the trial court and misconduct of the Assistant Prosecutor (only part of which was discussed herein). The Appendices in the State Supreme Court, show more such errors. But probably the whole record will have to be printed, if the Writ is allowed, to demonstrate the full extent of the errors; along the lines indicated above [5].

CONSTITUTIONAL QUESTIONS PROPERLY RAISED IN STATE COURT

The Appendix hereto shows that the individual violations of Petitioner's rights were properly preserved by objections and motions for mistrial. The Michigan Court Rules have abolished assignments of error. The minority opinion quotes from the briefs of Petitioner, his claim that he did not have a fair trial (167a). Therefore, unless this Court requests, or the State objects, we will not encumber this petition with references to Petitioner's briefs.

Footnote [5] Under recently adopted rules, the entire transcript is sent to the State Supreme Court, along with the Appendices prepared by the respective counsel. The majority claim to have read the transcript. As in many recent cases, the Court complained that the Appendices were incomplete; and it is now apparent, from rules subsequently adopted, that it is up to the Appellant to print practically the entire transcript in his Appendix.

No particular words are required to raise the federal question, if it is necessarily involved in the decision; *Arrow-Smith vs. Harmoning*, 30 L. Ed. 243, 118 U. S. 196. This Court considers the real substance and effect of the State Court decision; *McCullough vs. Virginia*, 43 L. Ed. 382, 172 U. S. 102.

In State criminal cases, this Court has been satisfied if the *circumstances* involving lack of due process were explicitly presented to the State Court. In *Taylor vs. Alabama*, 335 U. S. 252, 92 L. Ed. 1935, 68 S. Ct. 1415, this Court held that this court must make its own determination as to the action of the State Court in denying coram nobis (3 Justices voting for reversal) as to the *facts* in the case.

In *Moore vs. State of Michigan*, 78 S. Ct. 191, 355 U. S. 155, the majority said:

> "We may reasonably infer from the record that neither the trial judge nor the *Michigan* Courts thought that Petitioner's plight required the assistance of counsel to satisfy the requisites of the fair hearing secured by due process."

The minority held it was a question of fact.

In *Rochin vs. California*, 96 L. Ed. 183, 72 S. Ct. 205, 25 *A. L. R.* (2d) 1396, 342 U. S. 165, the Supreme Court of California denied an appeal, without an opinion; except that two dissenting Justices wrote an opinion that there was a "shocking violation of constitutional rights". So far as can be ascertained from the opinion in that case, and in most of the state criminal cases cited hereinbefore, no specific reference was made to the Federal Constitution; only to the facts and circumstances.

In *Uvegas vs. Penna.*, 93 L. Ed. 127, 335 U. S. 437-450, 69 S. Ct. 184, the petition to the State Court alleged that the prisoner had not been informed of his rights to counsel. This Court said:

> "We think the record adequately raised the federal question."

The minority opinion herein, alleging that the Petitioner had been denied his constitutional rights to fair and impartial trial (166a), necessarily involved Petitioner's rights

under the Fourteenth Amendment to the Federal Constitution. And the majority opinion negatively passed on the same question.

And the federal question was specifically claimed in the motion for rehearing. No doubt the State Court considered it had already passed on this point. Where a federal question is raised on a motion for rehearing in the State Supreme Court (such motion being specifically provided for in the Michigan Court Rules) it is sufficiently preserved, 54 *Am. Jur.* 885, note 18, citing *Cumberland Coal Co. vs. Board of Revision*, 284 U. S. 23, 76 L. Ed. 146; and *Brinkendorf-Farist Trust Co. vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107, (where the State Supreme Court denied rehearing without opinion).

For the above reasons, we submit that the constitutional questions here raised were at all times before the State Courts; and were fully (but incorrectly) passed on. If the counsel have been so confident that the State Courts would grasp and properly pass on the issues, that they did not spell out the words "due process" at all possible points, Petitioner should be protected from his own attorneys.

SUMMARY

Petitioner, a middle-aged attorney, was convicted of assault with intent to do great bodily harm on one Clark. Their farms adjoined. Clark was a large, young man of a vicious and quarrelsome disposition. Three weeks before the alleged offense, Clark had brutally beaten and choked Petitioner. Petitioner obtained an injunction against Clark molesting Petitioner, or coming onto Petitioner's property. Despite the Injunction, following a discussion between Petitioner and Clark's attorney of the violation of other terms of the Injunction, Clark drove into Petitioner's barn yard, and approached Petitioner, apparently for the purpose of assaulting Petitioner.

The three witnesses agree that Petitioner retreated uphill, along the side of the barn while Complainant pursued Petitioner until he was halted by a gate which opened the wrong way; and, according to Petitioner, also by heart pains. All witnesses agreed that the two men grappled. Complainant, testifying as to the details on the People's

rebuttal, claimed that he had been shot from 18 feet away. Petitioner testified that the gun was accidentally discharged as he fell to the ground and that two other shots were intentionally fired into the ground. The expert witnesses of the State Police, on People's case in chief, fully substantiated Petitioner's story; and completely refuted Complainant's story, as to the distance traveled by the shot.

The Assistant Prosecutor deliberately and intentionally began the nine days' trial with an opening statement filled with prejudicial statements; and continued to ask Petitioner and other witnesses question after question, day after day, about collateral, irrelevant and prejudicial matters, for the sole purpose of belittling Petitioner, and placing him in the worst possible light before the Jury as to his personal and professional character; and actually trying Petitioner for unrelated alleged offenses.

Three of the Justices said that this misconduct of the Assistant Prosecutor deprived Petitioner of a fair and impartial trial. The majority said, in effect, that this did not matter; nor the errors in admission of evidence under common law rules; nor the expert testimony; nor the errors in the charge (as to self-defense); so long as there was some evidence to substantiate the verdict. The methods used to obtain the conviction were, in effect, held immaterial.

No evidence of Petitioner's reputation or character was offered by Petitioner, and his reputation and character were not in issue. It was impossible for the Petitioner to anticipate or meet the repeated insinuations and accusations thrown against him, particularly to defend against claimed forgery, assaulting two boys with a shotgun claimed to have been committed three years before, an assault on Complainant's lawyer with a gun, and fraud claimed to have been committed in connection with Petitioner's application to practice law in the State of Michigan. This, and the deliberate and intentional conduct of the Assistant Prosecuting Attorney in bringing in all of these other unrelated claimed offenses and his intentional prejudicial conduct, beginning with the opening statement and continuing through to the final argument, bringing prejudicial error after prejudicial error into the case, any one of which should have been sufficient to reverse the verdict and con-

viction, and the cumulative effect of the numerous grave and serious errors brought into the case by the deliberate and intentional conduct of the Assistant Prosecuting Attorney, added up to denial of a fair trial and lack of due process.

Therefore, we submit that the three Michigan Supreme Court Justices were right; that Petitioner was denied the fair and impartial trial guaranteed to him by the Constitution; and that this necessarily involved his Federal as well as State Constitutional rights.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Michigan, to the end that this cause may be reviewed and determined by this Court, as provided by the authority of the United States, and that the judgment herein of the said Supreme Court of Michigan be reversed, and for such other and further relief as to this Court may seem proper; and that Petitioner be admitted to bail pending consideration of the merits of the cause.

CLIFFORD B. DYE,
Petitioner.

By

ANDREW J. TRANSUE,
Attorney for Petitioner.

RICHARD C. FRUIT,
Of Counsel.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CLIFFORD B. DYE,
Petitioner.

vs.

STATE OF MICHIGAN,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

ANDREW J. TRANSUE,
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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(4)

* * * (THE JURY WAS DULY SWORN). * * *

(5)

MR. TAYLOR, ASSISTANT PROSECUTING ATTORNEY, SAID IN PEOPLE'S OPENING STATEMENT:

* * * We propose to show that Mr. and Mrs. Clark married quite young, had two children, and that he generally has been a farmer all his life; that he had previously been working on another farm. He had a lease on it and he had some difficulty with the prior farmer over an agreement as to how many cows he should have to produce milk and that the prior owner of the farm did not live up to his contract and as a result Mr. Clark went to Mr. Clifford Dye, as an attorney, to seek legal advice. As a result of the outcome, Mr. Dye procured for Mr. Clark in settlement of their differences the sum of five thousand dollars. * * * Mr. Dye approached Mr. Clark after this five thousand dollar settlement and invited Mr. Clark and his wife to come in with him and to buy the adjoining farm to the present Dye farm. * * * Mr. Dye called incessantly for possibly a week or two, urging the Clarks to make up their mind to buy this farm — that is, Mr. Dye suggested that he buy the farm and that the Clarks put in their five thousand dollars and so forth. (6) Finally they did enter into this arrangement. As I understand, there was a regular written lease for a period of five years and it was, as I understand, I may be slightly off, but I understand it was sort of a fifty-fifty proposition * * * after expenses.

We will show when Mr. Clark took over this farm, that the first month or thereabouts the income from the milk check amounted to around fifty dollars and that during the two-and-a-half year period thereabouts, that the Clarks were on the Dye farm, by the way, I think there were two or three farms that were worked by the Clarks and the men that he hired — that Clark was able to bring that milk check up to an amount in excess of twelve hundred dollars a month. *And that's where the trouble appears to begin.**

*(Emphasis supplied).

We intend to show that generally the two got on very well, until this twelve hundred dollar check arose and then Mr. Dye began finding fault with this and finding fault with that and finding fault with something else and finally about May fifth, while Mr. and Mrs. Clark and their children, two small children — Sally and Sandy — were living on the adjoining farm, Mr. Dye cut off the milk check. He cut off the money. He refused to sign the checks so that Mr. and Mrs. Clark and their family would have money to pay their help and the necessary general expenses around the farm.

We will further show that about June seventh of that same year, Mr. Clifford Dye made application to the Gun Board of this County to carry a concealed weapon. We will further show that the next month thereafter, even though Mr. and Mrs. Clark continued to take care of these cattle, to continue to do this work month after month without any money whatsoever, finally showing that Mr. Clark had to take another job and do two jobs in order to keep this going.

Mr. Dye had started one suit and many injunctions against Mr. — I believe there is (7) only one injunction against Mr. Clark to prevent him from moving the property or disposing of it or so forth. Those Court files are there. They are public records and then in July he went to certain witnesses who will appear before you here and he made this statement to one witness. He said "The only way to take care of Clark is with a gun." That was in July. He told another witness who will take this stand and testify before you, that "the next time I take care of Clark, I will take care of him but good."

We will further show that Mr. Dye came to the Prosecutor's office and signed a complaint against Mr. Clark, charging him with an Assault and Battery, which case was tried and the jury returned a verdict of "Not Guilty" against Mr. Clark.

Mr. Dye then proceeded with another suit for ten thousand dollars damages which is also on file. Mr. Clark proceeded to employ an attorney, and Mr. Dye said "Clark, you are foolish to employ an attorney. You don't need an attorney. In fact the fact you are getting an attorney, I will spend five or six thousand dollars to beat you."

Now remember that Dye — lawyer Dye is a member of the Michigan State Bar and he is telling a client of another attorney not to bother with an attorney. • • • now when I say the Dye farm, I do believe that the farm and practically all of the farms have always been in Viola Dye. In fact Dye told Clark "I put it in her name so that none of my wives and none of my creditors can touch it." • • •

(9)

• • • And at that moment, Clifford Dye pulled a gun out of his pocket and says "Don't get smart with me." At that time Mr. Clark is approximately eighteen feet from Dye who is now at the corner of the barn. The first shot, the testimony will show, that this being an automatic, that he had his hand on the gun in such a manner as if to rack the gun to put a shell in place, and the gun exploded into the ground. The ballistics expert will testify if there was one — with this type of gun, if the person operating the gun did not know that there was one already in the (10) chamber, it would go off but it shows a preparation to get a cartridge into that gun in firing position. We will show that that gun was loaded before Clifford Dye ever came down near that barn that night, and that after the first shot was fired directly at Mr. Clark, that Mr. Clark started toward him and said "Dye, don't pull that pop gun at me" and he proceeded toward Dye to get that gun to protect his family and that there were in all, either three or four shots fired. The testimony is, Mrs. Clark — I think her testimony will be that she heard four shots. Mr. Clark's may be that he heard only three shots. He does not know, positively. He seems to be quite sure as to which shot, fired at him, struck him, but he does not know, but as he started toward Mr. Dye, Dye started to back up around the side of the barn and we will show that there is a little grade going upon this end of the barn. We have pictures and we will show you so you will be more able to follow the testimony as it comes out, and as he started to back up, he fell, and at that time Mr. Clark was right close to him, and he fell too and when Mr. Dye fell, his hand struck the ground and the gun that he had, flew out of his hand. Clark says to his wife, "Lois, Lois, get that gun." • • •

(11)

• • • We will further show that somewheres after midnight at the Flint Police Post that I arrived there I would say maybe one-thirty or two o'clock in the morning and that I talked with the officers. I talked with Mrs. Clark who was there and in the presence of Mr. Clifford Dye I had Mrs. Clark relate in his presence a statement as to actually how everything occurred. Now, this is her second statement remember. She has already made one to Chief Clark. She has already made one to me in the presence of Mr. Dye and we will further show that up to this time when Detective Walter Barkell and two other officers, Pozza and Lackey, were at he scene that Mr. Dye would not even come out of the house to show them what happened. He refused to tell them the time of day. In fact he says "I'm too tired." (12) And yet, we will show you further by a newspaper clipping of a statement that he made to Mr. Beets, the publisher of the Fenton paper of the statement that he made which goes on to state that everybody is lying but still he does not mention anything about what actually happened. • • •

We will further show that later on there was an Examination in Justice Court at which time Mr. Clark and his wife, Lois, testified as to the facts and occurrences that occurred on that particular night which would in fact make the third statement that Mrs. Clark had made.

Now, remember that her first statement was made to Orie Clark within minutes after the shooting. She had no time to meditate. She didn't have four or five months to think it over and then she made a statement which was transcribed.

MR. SMITH: If the Court please, I hate to do this when Counsel is making his opening statement but he is arguing. He isn't making a statement of fact. I object.

THE COURT: The purpose of his statement is to advise the Jury of the matters that you propose to show. If you confine yourself to those statements — I think you have gone slightly out of bounds.

MR. TAYLOR: I apologize if I have. The mere fact I mention these statements, that we have them and will be willing to produce them for you and will produce them.

We will further show as we go along, that something is very seldom (13) done, we are going to attempt to do it in this trial and that is to show motive. We don't have to do it, but we are going to attempt to do it. In doing so, as I told you before, the trouble started — we'll start it from the point where the milk bill got up to some twelve hundred dollars and we'll further show that at the end *Mr. Dye got the cattle, he got the farm and the Clarks are in debt.* We'll further show that since that shooting of August 25th, that Mr. Dye has gone about the country — in fact I'll produce a witness here to whom he directly went and told him, a colored gentleman on a farm just back of him, that the Clarks, you couldn't believe them under oath. They were liars.

We'll further show that this suit that was in progress, that there was some kind of a settlement reached in November and that beginning with December 1st, and every week since that until practically up to the date of this trial, that Mr. Dye has been placing ads in the Flint paper, the Fenton paper, the Holly paper, the Pontiac paper in which his name appears claiming that there has been some cattle stolen from him. In fact, one of his first ads he said several and last week's ads, it has risen now to twenty-five and great numbers during that period of time but he always states in the ad it goes back two months ago when it was stolen and of course his name is there and he is offering five hundred dollars now. We will show when he went back to Mr. Childress, this gentleman here who lives on the adjoining farm of another colored family, here about a week ago last Sunday, that he went there with a boy about fourteen years of age and entered the barn of another man without any consent or authority of these other colored people and he had sent the boy in to look and the boy said "I think this man has one of your striped pigs." • • •

(14)

LOIS CLARK, a witness for and in behalf of the people of the State of Michigan, being first duly sworn, testified as follows (in part):

DIRECT EXAMINATION
(20)
Conducted By Mr. Taylor:

* * *

Q. Do you know as a matter of fact that the checks that came for the milk, in whose name were they?

A. When we first started on shares together, they were in William C. Clark and Clifford B. Dye's name. Then there was trouble with him and his wife and he came to us and asked us if we had any objections of his taking his name off the milk check and putting his sister's name on and we said we didn't have any objection to that.

Q. Did he tell you why he wanted you to do this?

A. Yes, he did.

Q. What was the reason?

A. He was having trouble with his wife and he was afraid that she might try to latch onto the milk check or part of it.

Q. Was there anything else that occurred about these milk checks? Were you ever asked to endorse a milk check?

A. Yes, I was. At one time after his sister's name was put on the milk check, we had to send them to Louisville, Kentucky, to have them signed. * * * Then he — * * *

(21)

Q. Who?

A. Mr. Dye asked me. He says "Why don't you sign my sister's name on the milk check" and I said "No". I wouldn't sign anyone's name other than my own. * * *

Q. Did he on any other occasion tell you why Viola Dye's name was on his property?

A. Yes, he told us. Of course he told us some of his domestic troubles and he said that he had been married several times and that he —

MR. SMITH: Just a minute. If the Court please, I have perhaps been dilatory. I purposely restrained from objecting. However, this whole line of testimony is immaterial and irrelevant. I was in hopes Mr. Taylor would be satisfied with just a general outline so the Jury would get the picture but he apparently isn't (22) and wants to go into details. I object to it, being immaterial. If he can state any reason why it is material to the issues in this case, I will be glad to withdraw my objection.

MR. TAYLOR: The reason, if the Court please, I think I stated to the Jury that this trouble began when the milk check ran to twelve hundred dollars a month and my intention is to show that Mr. Dye's interest was only in getting all of the property at any time from anybody that he possibly could, which I contend. * * *

MR. SMITH: * * * I ask it be stricken for the same reason that I said before because it is irrelevant and immaterial * * *.

THE COURT: May we have the question.

(Last question read by reporter: "Q. Did he on any other occasion tell you why Viola Dye's name was on his property?")

(23)

MR. SMITH: I object to that as immaterial and irrelevant.

THE COURT: I take it counsel is laying a basis for the showing of one of the essential elements of this matter.

MR. TAYLOR: That's right.

MR. SMITH: What could possibly be that element?

MR. TAYLOR: There are several to show that the general trend of Mr. Dye throughout this entire transaction has been one whereby he has been looking out for Dye, that this property belonged to Dye; that he kept it from the creditors and that it goes to the intent.

MR. SMITH: If the Court please, counsel, if I may say so, is getting dangerously near what I now could insist upon as grounds for a mistrial. If he wants to infer that he can attack the character of the respondent in this case, that of course Your Honor would recognize as being improper. * * *

THE COURT: It is now twelve o'clock. I think it would be wise to recess for the noon hour and the Court will rule after the recess at one-thirty. If either counsel have support for their position, I will be glad to listen to it between one-fifteen and one-thirty.

AFTERNOON SESSION

(Mr. Taylor continues Direct Examination of Lois Clark as follows):

Q. After you and your husband entered into —

THE COURT: May I make a ruling first. Just before recess, the question of the admissibility of certain testimony was raised. Witness had an answer which was not entirely responsive to the question, and made reference to the possible alleged marital difficulties that the respondent may have had. Now, that testimony is immaterial to this (24) cause and it is too remote to have any concern or give the Jury any concern. You are requested to disregard that portion of the testimony of the witness which had to do *with marital difficulties of the respondent prior to the time the lease was entered.* (Emphasis added).

MR. TAYLOR: So I understand now, the testimony as to the check and the signing of the check and the name of the person stands?

THE COURT: Yes. • • •

Q. The Crop and Livestock Share Farm Lease is what this is known by and the lease was entered into the 1st day of April, 1953, between Viola Dye, landlord, and William C. Clark and Lois Clark, tenants. How long after that did you enter into this agreement or move on the farm?

A. A month. • • •

(31)

Q. Well, what happened that you no longer got any money from the milk checks?

A. We went into Court with this matter. • • •

Q. By the way, was there an injunction against you and your husband?

A. Yes, there was. • • •

Q. Whatever date it is, that injunction being a part of the record in the Court files would designate the time?

A. Yes.

Q. From that day on you received no money from the Dye farm?

(32)

A. No, we did not.

Q. Well, what did you do after the money was cut off? Was there any more work done on the farm?

A. Yes, there was.

Q. By whom?

A. By my husband and myself.

Q. What would you do on this farm, Mrs. Clark?

A. I did everything.

MR. SMITH: I object to that. It is immaterial.

MR. TAYLOR: I contend, if the Court please, that what went on in the farm during this time was part of the res gestae of the facts and circumstances.

THE COURT: The witness may answer.

A. I did everything from milking the cows to driving the tractor and helping in the hay field and such things as that.

Q. Did you perform those services generally throughout the entire time you were on the farm?

A. Yes, I did.

Q. Mr. Dye knew that?

A. Yes, he did.

Q. How long did you continue to take care of the farm after this injunction was filed against you and your husband?

A. Until my husband was shot. • • •

Q. You did that without receiving any money from the farm proceeds of any kind?

A. Yes. • • •

(33)

Q. On August 26th was your husband employed anywhere else other than on the Dye farm?

• • • A. He was employed at Pontiac Tank. • • •

Q. If he had this contract why did he seek other employment?

A. Because we had no other income. We were pressed. We had to feed our family. We had no other income so he had to go to work. • • •

(53)

• • •

Q. What was the first thing that you saw Mr. Dye do as far as the gun was concerned?

A. Well, I don't know what he was doing with the gun. I mean, he drew it out and then he was monkeying with it. I don't know what he was doing. I was scared. He drew the gun out and was monkey — with it with his hands and the gun went off.

Q. At the time it went off, which direction was the gun facing at that time when it went off the first time?

A. It was facing down towards the pond.

Q. Away from your husband?

A. Yes.

Q. You say he had both hands on the gun?

A. Yes, I believe he did have both hands.

Q. When it went off?

A. Yes.

Q. What was the next thing he did?

A. My husband asked me before that if I had seen the gun when he was monkeying with it. I said I did. The first shot went off, and my (54) husband said, "Don't use that gun on me" or words to that effect. I don't remember the exact words. I was excited. Then he shot again.

Q. Who did?

A. Mr. Dye.

Q. What position was Mr. Dye and the gun when he fired the second shot in relation to your husband?

A. He was backing up and my husband was walking towards him.

Q. Where was the gun pointed, Lois?

A. At my husband.

Q. At the second shot?

A. He was pointing it at my husband.

Q. He was pointing it at your husband?

A. He was pointing.

Q. Was he firing it when it was pointed at your husband?

A. He was firing it when he pointed it at my husband and at me too. The bullets were flying.

Q. How many bullets were fired to the best of your knowledge?

A. Three or four.

Q. When did you first learn that your husband had been struck with a bullet?

A. When I got around in front of him I seen blood coming from my husband's mouth and I noticed that he was bleeding from the stomach or down in that area and that's the first I had noticed it.

Q. Now, while Mr. Dye is at the northeast corner of the barn and your husband now is approaching him, how many shots were fired while Mr. Dye is in that location?

A. One. The one that went in the ground.

Q. Where was Mr. Dye when the second shot was fired?

A. Back up towards the yard a ways.

Q. Back here?

A. Back further.

(55)

Q. You mean just back from the corner?

A. There is another photo taken that shows you where the other shot was fired approximately.

Q. Showing you proposed Exhibit five, I will ask you whether or not it depicts the area?

A. Yes, I believe it does.

MR. SMITH: Is that the second shot you are talking about now?

MR. TAYLOR: I am just going to find out.

Q. The first shot you say was fired you say somewhere in this locality?

A. About in that locality, yes.

Q. Approximately now how far would your husband be from Mr. Dye when the second shot was fired?

A. I don't know. Probably fifteen to eighteen feet. I don't know.

Q. Where were you when you say the bullets were flying around you?

A. I was right beside my husband, right behind him.

Q. Back here at the corner of the barn?

A. I guess I was right there some place. I know I was right there. I seen it all. * * *

Q. What was the position of the parties when the third shot was fired?

A. At that time I was so upset that I really only know just about what anyone would know in excitement as that but when the third shot was fired, they were either — it was the third or fourth shot because I am not sure how many shots. At that time they were tussling and they were back by the gate.

(56)

Q. Dye had backed up toward the gate and also your husband at that time? Is that right?

A. Yes. My husband was going towards him, trying to get the gun from him.

Q. Looking at proposed Exhibit six, does that in any way show the progressive position of the parties?

A. Yes, approximately.

Q. Now, I notice there are two men in the pictures. They are both officers. What, if any significance does that have?

A. This was about the distance they were apart when that shot was fired.

Q. That's the third shot?

A. Yes. * * *

Q. Now, when you left the stand at recess, we had gotten to the third shot. Do you recall another shot?

A. When they were tussling or when my husband was trying to get the (57) gun from Mr. Dye and they got up to the gate and Mr. Dye, before he, or when he was stumbling over this knoll, I thought another shot went off. Maybe I am wrong but it seems like there was another shot went off in the air.

Q. Did you see the gun pointed in the air?

A. Yes.

Q. At that time where was your husband?

A. He was right there. He had hold of Mr. Dye's hands.

Q. Showing you People's proposed Exhibit seven, I will ask you whether or not that in any way shows the area where you contend or believe the fourth shot to have been fired?

A. Yes, it is.
Q. There is a gate there?
A. Yes.
Q. You say that Mr. Dye fell *woen* over a knoll?
A. There was a little knoll there that you can see.
Q. Will you point that out please?
A. Right here.
Q. There is a little knoll at the gateway?
A. Yes.
Q. You contend that Mr. Dye fell down at that time?
A. That's what it looked like.
Q. And your husband, what happened to him?
A. He went right on top of him — well not on top of him but the side of him.
Q. What happened, if anything, when these two parties fell to the ground?
A. My husband was holding him down and I got around to the front of them and my husband told me to get the gun and I got the gun.
Q. What words did he use?
A. He said "Get the gun." He said, "Get help" my husband said.
Q. What position was Mr. Dye on the ground when your husband said "Get the gun"?

(58)

A. He was lieing, his head was facing the west.

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(68)

WALTER BARKELL testified for People as follows:

DIRECT EXAMINATION

Q. In your presence did I ask Mr. Dye if he wanted to ask you any questions about what happened?
A. Yes, you did.

Q. Did you hear me ask Mr. Dye if he wanted to make a statement or tell me about what happened?

MR. SMITH: Just a minute. I assume that this was transcribed and I think the stenographic report would be the best evidence of what was said.

MR. TAYLOR: I didn't ask for anything that said. I asked whether or not I asked Mr. Dye if he wanted to make a report.

MR. SMITH: Even though, there is a leading question. It is involving a conversation which apparently was reduced to writing. At least taken down by a stenographer. We would very much like to see that stenographic report.

(Reporter read the last question as follows: "Did you hear me ask Mr. Dye if he wanted to make a statement or tell me about what happened?").

THE COURT: Witness may answer.

(69)

Q. In response to interrogation or my question of Mr. Dye as to whether or not he wanted to tell me about any of the facts or circumstances or how it occurred, in your presence did he refuse to make such a statement?

A. Yes. • • •

(70)

THE COURT: You may ask the question as to whether or not he made a statement but as to what he said, that's best shown by the statement.

Q. Did he make a statement or did he not?

A. No, he did not. • • •

(77)

Q. Can you give us approximately the time that you arrived at the Dye home?

A. Eight twenty-five.

Q. Where was Troopers Pozza and Luckey at that time?

A. They come into the home with me.

Q. Did you have some conversation then with Mr. Dye or with Mr. Bremmer in Mr. Dye's presence?

A. Yes. The discussion of evidence come up that Mr. Bremmer was in possession of evidence. Then we went over to Mr. Dye and he advised the victim's wife and two children were not present.

Q. I am not following you.

A. They were not present when the incident happened or whatever happened at the farm. They were on the opposite side or behind the barn and he said Clark —

Q. Who made that statement?

A. Mr. Dye.

Q. He told you at that time Mr. Clark and the children were somewhere else?

A. Mrs. Clark.

Q. Were not —

A. Were not in view or not in sight.

Q. What else, what conversation did you have, if any?

A. He said Clark was going to kill him and then I inquired about the spot on his T-shirt and he said that "it is not through any wrong-doing on my part." So I inquired as to whether he had a gun and he said he had a small gun he had a license for it. Then I inquired if he would take me to the scene or accompany us to the scene of the incident. He advised me that he was too tired and (78) and for Mr. Bremmer to accompany the officers or we three to the scene. • • •

(91)

MR. TAYLOR: If the Court please, before the Court adjourned yesterday the question of a statement with regard to Mrs. Lois Clark was brought up and under the rule of the Delabondi case, it is incumbent upon the People of course to produce these statements. • • • Then we'd be glad to offer it in evidence. In fact, I will have it marked now People's proposed Exhibit eighteen. • • • (92) The Court will take under advisement our motion to have this admitted in evidence?

THE COURT: Perhaps Mr. Smith will concede rather, but at least the record shows you submitted a copy to Mr. Smith under the rule. • • •

(112)

Q. Referring to People's Proposed Exhibit three, the picture of Mrs. Clark in that particular location of the barn, what did she tell you at the time that that represented?

A. That would have been when the first shot was fired into the ground. The first shot that was fired.

Q. What did she tell you with regards the point where she is standing?

A. It is about —

MR. SMITH: That demonstrates, if the Court please, the importance of not asking leading questions. The answer now is it was about.

MR. TAYLOR: With regards any of these photos that were used by Mr. Smith —

MR. SMITH: Those are your exhibits please.

MR. TAYLOR: As I said, you used them here. In fact we have the photographer here. We are willing to admit them now if there is no objection.

MR. SMITH: I want to cross-examine the photographer when he is put on the stand.

Q. The measurements that were given to you by Mrs. Clark when these pictures were taken were they supposed to be exact or about?

A. It was about and approximate.

MR. SMITH: I ask that question and answer be stricken. It doesn't call for a conversation. It calls for a conclusion. Were they supposed to be — about.

THE COURT: The answer is not prejudicial. It may stand.

• • •

(115)

WALTER BARKELL returns to stand —

RE-DIRECT EXAMINATION (Continued)
By Mr. Taylor:

(Walter Barkell is a Detective for Michigan State Police).

Q. While the Jury is looking at that picture, and your testimony with regards the conversation you had with Mr. Don Bremmer, who at that time was the attorney for Mr. Dye, wherein he stated in Mr. Dye's presence that there were other pieces of evidence, from that time that you talked with Mr. Bremmer, have you at any time received any other pieces of evidence from Mr. Bremmer or anyone else?

A. No, I haven't. • • •

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(130)

MATTHEW SATKOWIAK, a witness for the People being duly sworn testified as follows (in part):

Conducted by Mr. Taylor:

(131)

• • •

Q. • • • Did you at any time talk with Mr. Dye • • • relative to Mr. Clark • • •?

Q. Now that is what we want. Tell us what he said:

A. He says "There is only one way to talk to Mr. Clark and that is with a gun. • • •."

(133)

• • • Q. Did you get to talk to Mr. Dye?

A. Mr. Dye asked who it was or he wanted to know who it was and I said "This is Matt Satkowiak." My wife sat right there near the phone. When he picked up that receiver, I had it away about that far so my wife could hear some of the ifs, and he said, "You dirty son of a bitch" that's the words he said, and he hung up on me. • • •

Q. Did you ever get your money?

A. No, up until today I haven't received my money and the money I went down to see Harvey Lodge this noon and Harvey Lodge says my money — • • •

(136)

• • • Q. The mere fact, Mr. Satkowiak, that you may be incensed and having feelings of animosity towards Mr. Dye in that respect, would you take the stand and perjure yourself as to anything Mr. Dye said to you because of that?

(137)

A. No. • • •

RE-CROSS EXAMINATION
Conducted by Mr. Smith:

Q. Has Mr. Clark stayed at your house at any time recently?

A. After he got shot. After he came out of the hospital he stayed about a week. • • •

RE-DIRECT EXAMINATION
Conducted by Mr. Taylor:

Q. Do you know of any reason why he stayed at your house?

A. Because he was scared of being, of Mr. Dye being at the farm so I give them a home. • • •

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(148)

WALLACE L. VAN STRAIT (State Police witness for the People) testified as follows:

Q. Now, let me show you People's proposed Exhibit 2. Will you just examine that for a moment please? Can you tell from that cake of soap the point of entry and the point of exit?

MR. SMITH: He can't even tell it's a gunshot. If so, he certainly can't tell what caliber it was because it is a lot bigger hole than is involved here.

THE COURT: Perhaps you are confusing the record. You said Exhibit 2 — that is a bullet.

MR. TAYLOR: I meant twenty.

MR. SMITH: Counsel introducing something that at the point of entry has a hole as big as a .38 isn't that right?

A. Yes.

MR. SMITH: It is immaterial, irrevelant —

MR. TAYLOR: We will produce a ballistics expert who will testify it is the entrance of a twenty-two bullet at a distance of seventy-five yards.

THE COURT: It hasn't been offered yet.

Q. Can you tell me, sir, as a matter from your experience, that if a twenty-two bullet was fired at this cake of soap at a distance of seventy-five yards, that you would have the results that you have here?

A. I am not in a position to answer that one way or another.

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(161)

PROCEEDINGS HAD FEBRUARY 17, 1956

Witness LOIS CLARK returned to testify, in part, as follows:

CROSS EXAMINATION (Continued)
By Mr. Smith:

(198)

MR. SMITH: • • • Would it be agreeable? I'd just as soon offer the entire Court file. I'm only interested however in the pleadings.

MR. TAYLOR: Counsel, I certainly have no objection. They are Court records. They are available regardless.

MR. SMITH: May we treat the Court file in Chancery, Case 27819 as offered and received in evidence — Exhibit I? • • •

(208)

RE-DIRECT EXAMINATION
Conducted by Mr. Taylor:

(209)

* * * Q. There has been considerable mention about — by the way, you stated on Cross Examination that you had received a lot of papers, legal papers. Do you see how many I have here?

A. Yes.

Q. When you were in Court did you see a lot of these papers like I am showing you here?

A. Our attorney had to carry some of them. He couldn't carry them all and had us bring some of them to Court.

Q. Isn't it true, every week or every month there was a new paper served on you by Mr. Dye?

A. There was papers served on us constantly.

Q. Since these are admitted, if the Court please, I am going to ask that at the proper time that the Jury have the benefit of these legal papers showing the litigation —

THE COURT: It could be available to the Jury if they wish to see them, if they are received I should add.

MR. SMITH: That I think we stipulated be received.

THE COURT: That's right.

Q. As a result of this litigation, did you finally enter into a stipulation as far as that case is concerned? Was there an order entered whereby certain things were to be done when that case was closed out?

A. Yes.

MR. SMITH: Are you referring to —

MR. TAYLOR: The final order. It is a part of the file.

(210)

MR. SMITH: If the Court please, this case has now been settled. I haven't any objection to the terms of the settlement, if that is what is wanted but coming after the shooting, we think that would have no bearing on the merits of the case.

THE COURT: Regardless of whether it has bearing or not, the whole file has been received. If Mr. Taylor would like to read into the record a portion of the settlement provisions, it is permissible.

Q. This is a copy of the Order which is in the file. I believe this is People's proposed Exhibit 23. This is a copy of the Order that is in the file.

THE COURT: Would you rather the Order in the file be used? Wouldn't it be confusing to the record? Perhaps counsel would stipulate it is a part of the file.

MR. TAYLOR: It's a certified copy. No, I guess it isn't. It's signed by Mr. Dye.

THE COURT: Let Mr. Smith examine it.

MR. SMITH: May we have the Order that was presented?

THE COURT: Mr. Taylor, I take it you are reading a stipulation to discontinue the cause which is represented in this Court by Exhibit I which is Chancery File C-27819.

MR. TAYLOR: I'm sorry. This is a final order and not a stipulation.

THE COURT: I suggest for the brevity of time that you read only the material portion.

MR. TAYLOR: If the Court will bear with me for a moment, there are so many paragraphs here I am trying to select which is more pertinent. It is (211) further ordered, adjudged and decreed that the lease between the parties is hereby terminated by mutual agreement of the parties and that the defendants (the Clarks) shall forthwith surrender possession to the plaintiff all the real property of the plaintiff which they have heretofore had possession of and that the defendants likewise in accordance with the provisions of the stipulation shall surrender possession of all livestock of every kind and nature now upon the plaintiff's property and their rights to any livestock on the property of R. V. Crawford and including all cattle, swine, contained in the inventory taken by Bob Wiles and John K. Wray on or about September 13, 1955, excepting such livestock consisting of cattle and swine which according to the stipulation appear to be lost, strayed or stolen, and the recovery of which livestock shall be the responsibility of the plaintiff and all cattle, swine men-

tioned in this paragraph shall henceforth be the exclusive property of the plaintiff including any cattle and swine recovered.

"It is further ordered, adjudged and decreed that the defendants, the Clarks, shall personally assume and settle all other debts and obligations incurred by them or either of them in connection with the farming operations including the bill to Poppy and Lauer, Inc. and all indebtedness to the Vernon State Bank and the Clio State Bank with the exception of the obligation herein provided to be settled by the plaintiff (212) and the plaintiff shall henceforth be released from any further liability in connection with all notes, mortgages, executed to the said banks by the defendants.

"The defendants shall forthwith deliver to Clifford Dye the fifteen hole grain drill and deliver to the plaintiff's farm the John Deere Chopper which said terms were, heretofore removed — which said items, pardon me, were heretofore removed from the plaintiff's farm by the defendants.

"It is further ordered, adjudged and decreed that in addition to the above mentioned livestock, the plaintiff, Mr. Dye, shall henceforth have exclusive possession and the ownership of the following: the combine, the baler, the old corn binder, the old truck less the deck and rack, the fuel oil tanks, the gas tank and the before mentioned chopper provided however that the plaintiff shall assume and pay the lien of the State Savings Bank of Fenton in the approximate sum of six hundred dollars upon said chopper and save the defendants harmless in connection with such liens and indebtedness; that Dye shall have the ownership and possession of said grill.

"It is further ordered, adjudged and decreed that the defendants shall forthwith cause to be assigned to the plaintiff all of the cash in the bank account on deposit in the State Savings Bank of Fenton in the joint names of William C. Clark and Viola Dye and such assignments shall be accompanied by the plaintiff's (213) attorney Donald J. Bremer and the defendants' attorney L. Harvey Lodge, executing and signing a check to Viola Dye for the balance remaining in said account and that the plaintiff shall thereafter apply said sum to the settlement of the

obligation herein provided to be settled by her." This is the second paragraph on the second page: "Mr. Dye shall within two weeks —" Do you have the original as to the date?

MR. SMITH: Twenty-fifth day of November, 1955. This isn't the original.

MR. TAYLOR: This order was entered November 25, 1955 and on the second paragraph on the second page, "the plaintiff shall within two weeks submit to L. Harvey Lodge, defendants' attorney, proofs of the settlement of all said obligations."

Q. Have you up to this time ever received any such proof of any obligations that they have been paid?

A. No, we have not.

MR. SMITH: It said as to L. Harvey Lodge.

MR. TAYLOR: Mr. Lodge is their lawyer.

MR. SMITH: Yes. He would be the one to ask the question.

MR. TAYLOR: I would be very glad to produce him. He is available.

Q. These debts that were contracted by your husband and Mr. Dye, do you know as a matter of fact, I mean, even to the terms of this order, these obligations were to have been paid by Mr. Dye?

A. That was the impression that we were under.

Q. It states so in the order?

A. Yes.

Q. Do you know as a matter of fact that Mr. Dye has gone to these creditors and in fact asked them to take a lot less because you (214) people were in bankruptcy, so as to affect your credit?

MR. SMITH: I again appeal to the Court. This is the People's witness and counsel is trying to put words in her mouth. You know sometimes if the answer is "No" it is still confusing two days from now.

THE COURT: I think the greatest problem is whether the witness can answer in her own knowledge.

Q. Can you answer of your own personal knowledge whether Mr. Dye contacted any of your creditors and offered to settle the amounts that were owing by you and Viola Dye for a smaller amount?

A. Yes. • • •

Q. Now, you notice that I read here that some cattle have been lost, strayed or stolen. Did you or your husband steal any of these cattle?

A. No, we did not. • • •

Q. Do you know of any one animal that you or your husband or anyone connected with you removed from this farm at any time illegally?

A. No.

Q. You did have some of your own cattle there did you not?

A. Yes.

Q. Did you get those cattle when you left this farm?

A. No.

Q. They went with this settlement too did they not?

(215)

A. Yes. • • •

Q. Which paper do you take?

A. We take the Pontiac Press and Holly Herald or Herald Advertiser.

Q. Have you seen in that paper advertisements with the name of Dye to the effect that a reward would be paid for swine or cattle lost, strayed or stolen from the Dye farm?

A. Yes.

Q. Do you know when those ads started, when you first saw them and —

A. It was after we made our settlement on the farm case, sometime in November. I don't know how soon after.

Q. Do you know how long they continued?

A. Up until last week in the Holly Herald or the Herald Advertiser it was in.

Q. Do you know as a matter of fact the first ad stated only several cattle while the ad several months later stated some twenty-five cattle and some fourteen swine, starting out with several. Do you know that?

A. Yes, there was variations in the ad at different times that it was run. It was run differently.

Q. In fact the tempo started out with no reward and do you know as a matter of fact that the last issue placed in there was five hundred dollars reward just before this trial started?

A. I don't remember if the first ad said there was no reward or not but I do recall the last reward I saw was five hundred.

Q. Do you remember whether or not the first ad was just a little liner ad while the last ad was a display ad before this case started?

(216)

A. Yes.

Q. Do you recall Mr. Dye's name occurred in those ads?

A. I know they occurred in some but I can't say it occurred in every one because I don't remember. • • •

(218)

Q. Is that the day you say your husband was arrested that day?

A. Yes.

Q. For assault and battery and placed in jail?

A. Yes.

Q. And there was a trial?

A. Yes.

Q. You were there?

A. Yes.

Q. Jury trial?

A. Yes.

Q. And the Jury returned a verdict of what?

A. Not guilty.

Q. Let me ask you now, is there another suit for ten thousand dollars started by Mr. Dye against your husband for the injuries of that assault and battery that you know of?

A. Yes. • • •

Q. Do you know as a matter of fact whether or not this case is still continuing?

A. Which case?

Q. The one for ten thousand dollars for assault and battery.

A. I don't know if it is or not.

MR. TAYLOR: Let me say, if the Court please, that this case also in this file, I'd like to have it here and if the

Jury would like to, that they may have the opportunity of seeing it.

THE COURT: Are you offering it, Mr. Taylor?

MR. TAYLOR: Yes, Your Honor. This is Clifford Dye vs. (219) William Clark C-38462. It's a law file.

THE COURT: What is the date of the filing of that lawsuit?

MR. TAYLOR: The declaration was filed June 17, 1955, at two o'clock. With the Court's permission I would like to put into the record the declaration.

MR. SMITH: Just one moment. I don't know to what extent it is proper to go into these collateral matters, I think it is material for the Prosecutor to show that the defendant in this case did sue Mr. Clark for damages just as it would be proper for us to show that they might have sued Mr. Dye but to go into the merits of the pleadings, I don't know what is in there. I had nothing to do with them and I don't think they are material.

THE COURT: It seems to me, gentlemen, we are getting a little afield when we go into all these collateral matters. Of course they should be before the Jury but there comes a point beyond which we shouldn't go in this cause that we are hearing today. Now, what did you have in mind, counsel, to read?

MR. TAYLOR: Just the declaration, if the Court please, which emanates from the opening of the door by counsel of the physical violence that took place on that day which is a part of our motive.

THE COURT: I realize the matter has been opened.

MR. TAYLOR: That's all I am interested in is the Declaration.

THE COURT: Can't you make a brief statement on the record that counsel might concede to without reading (220) the whole file?

MR. TAYLOR: I will be glad to read three small paragraphs. I have no objection if he wants to read the whole matter.

MR. TAYLOR: I will jump down to paragraph two, "That the said defendant, that is William Clark, on the 24th day of May, 1955 did wrongfully and maliciously commit an assault and battery upon the said plaintiff, Clifford Dye, at the residence known as 1418 Grange Hall

Road and did then and there beat, choke, jerk, push, throw, bruise, wound and otherwise ill-treat the plaintiff; that thereby the said plaintiff became so sick, sore, lame, disordered, bruised, sprained, about the face, the head, the mouth, the neck, the shoulders, the arms, the hands, the back of the spine, the chest, the abdomen, the hips, legs, the knees and feet, and so continued for a long space of time, to-wit: from thence permanently; that during all such time, the plaintiff suffered great pain and was prevented from attending to his necessary affairs and business and will permanently so suffer; that the plaintiff is by occupation an attorney-at-law; that also said Plaintiff was obliged to incur, did incur and will henceforth incur great expense in endeavoring to be cured of said said injuries and resulting disabilities; that the plaintiff was, because of said injuries, damaged to the sum of ten thousand dollars." • • •

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(229)

REGINALD CRAWFORD, a witness for the People, being first duly sworn, testified, in part, as follows:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

(230)

• • • Q. What was the occasion for this conversation about Clark with Dye?

A. Well, they had inventoried cattle.

Q. What month would that be, sir?

A. I believe it was June or July. I'm not too sure, now, when it was but it was two days after an inventory of cattle and he came down in my yard. He drove into my place and we were just talking. He seemed to be a little worried over the cattle to the effect that the inventory he thought there was one more. He tried to confuse the number of cattle. • • •

Q. What specifically did he say with regard the Clarks, what was that conversation?

A. Well, he was highly aggravated and he said at the time that he would fix Mr. Clark but good if he didn't straighten out.

Q. *Did he tell you he would fix him good with a gun?*

A. *No.* (Emphasis added).

MR. SMITH: Pardon me. Why don't you pay attention to the rules of Court instead of injecting that stuff?

MR. TAYLOR: You can object to it.

THE COURT: The Jury will disregard any reference to the gun and the question.

MR. TAYLOR: Anything that is improper the Court can order stricken.

MR. SMITH: All I am saying counsel knows better and why does he do it?

(231)

THE COURT: The matter has been finished and ruled upon.

Q. What was this business relationship you had with Mr. Dye?

A. It concerned feed. Pasture of cattle, dairy cattle and beef cattle, both, and I believe the Clarks and Mr. Dye were not getting along very well and they had inventoried them and they wanted to take them out and I disagreed with that on the point I wanted my money. • • •

(232)

Q. Did you at any time ever see Mr. Clark ever strike Mr. Dye?

A. No, I did not.

Q. Did you ever hear Mr. Clark at any time threaten Mr. Dye?

A. No. • • •

WILLIAM CLARENCE CLARK, Complainant, being first duly sworn, testified as follows:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

(233)

* * * Q. Where are you employed at the present time?
A. Pontiac Tank.
Q. For what period of time have you been so employed?
A. I hired out at Pontiac Tank August 22nd, about that date.
Q. That would be four days prior to the question here of August 26th?
A. Yes, sir.
Q. At that time you were aware that there was an injunction against you from working somewhere else?
A. No, I don't recall any injunction against me working any place else. No, I don't.
Q. Have you had injunctions served upon you by Mr. Dye?
A. I had lots of papers served against me. I couldn't tell you what they all were right now, sir. * * *

(234)

Q. This is People's proposed exhibit twenty-five which proposes to be a crop lease which was entered into by Viola Dye and Mr. Clark. I will show you People's proposed Exhibit twenty-five and ask you if you can identify that instrument.
A. You mean the lease?
Q. Yes, is that what it is?
A. It is something like this. I can't tell you if this is the same one. My signature isn't on it. It looks like something we made out.
MR. SMITH: We will stipulate that is the lease. It was attached to your attorney's pleadings, Mr. Clark, in one of the Civil lawsuits.
MR. TAYLOR: Thank you, Mr. Smith.

Q. When you entered into this lease, for what period of time was the duration of it?

A. Five year lease. * * *

Q. Which farms were these to cover, Mr. Clark?

MR. SMITH: I think the lease will show that too. I suggest we read it in the record.

THE COURT: Is this lease the same as Exhibit one?

MR. SMITH: It would be.

MR. TAYLOR: I think that possibly is correct. I didn't have it marked here. May we correct —

(235)

MR. SMITH: Yes, Exhibit one is the farm lease.

MR. TAYLOR: May we correct this and have the identification of People's Exhibit twenty-five stricken as of this so marked as People's Exhibit one.

THE COURT: You may.

MR. TAYLOR: There is so much to this.

MR. SMITH: So we will have an understanding, you asked the witness what farm was covered by the lease and I think the lease itself shows that and if you would read any portion of *it that you want in the record, it* will save time and save me objecting.

MR. TAYLOR: All right. The lease was for five years?

A. Yes.

Q. And substantially I see that under paragraph F. Ownership of stock, the landlord's portion to be divided was fifty per cent and the tenant was to be fifty per cent?

A. Yes, sir.

Q. You were to run this farm for Viola Dye?

A. Yes, sir. Viola Dye was mentioned and Clifford Dye. We worked together on it. I never seen Viola Dye for a year after I got on the farm. Clifford and I did all the business, bought everything and agreed to everything.

Q. When you entered into this contract with Mr. Dye, what was the understanding, if you went into this contract, with relation to the farm that you were on as of August 26th? Did that farm upon which you resided on August 26th, I beg your pardon. I'm in error there. The farm upon which you resided on October 25th prior to en-

tering into this lease, do you know whether or not Mr. Dye or Viola Dye had purchased that farm?

A. Owned it?

Q. Yes, the one adjoining the one upon which you lived.

(236)

A. Yes. I couldn't at that date — that date, I don't know, if he had the other farm bought or not.

Q. Was there any conversation between you and Mr. Dye about purchasing the farm adjoining his farm at the time you entered into this agreement? Do you understand what I mean?

A. Yes, we done some talking. I don't understand you.

Q. Any time you don't understaad me, I want you to make it definitely plain. I don't want you to answer unless you do understand. You had some conversation with Mr. Dye prior to entering into this lease did you not?

A. Yes.

Q. And Mr. Dye, you and Mr. Dye agreed upon tentatively, the terms that are in this lease?

A. Yes.

Q. What farms were covered? Which farms were you going to work?

A. I worked them all.

MR. SMITH: I think the lease is specific on that subject.

MR. TAYLOR: I am talking, Mr. Smith, prior to the execution of the lease.

MR. SMITH: I think that would be immaterial, if the Court please. The lease constitutes the agreement between these parties, signed by them and operated under by them.

THE COURT: The lease speaks for itself as the consummation of the meeting of the minds were reached. To the matter before us today, I think conversation preceding the case might be material. At least, he may answer this particular question.

A. I was working all of the land, all the farms that Viola Dye was supposed to own.

(237)

MR. SMITH: It appears that witness isn't talking about sometime before the lease. He is talking about after the lease.

MR. TAYLOR: I think you are right.

THE COURT: If the answer is in relation to the period after the lease, it may be stricken.

A. No. • • •

Q. Before you entered into this lease, do you know whether Mr. Dye owned that farm at 1418 Grange Road or whether or not there was arrangements made to buy it if you entered into this and would come upon the land?

A. Before that date? I don't know if he owned the farm or didn't own it. As near as I could figure it, she or he owns —

Q. I asked you was there any conversation between you and Mr. Dye relative to buying the farm that you lived upon at 1418 Grange Road before you entered into this lease?

A. Sure.

Q. Sure what?

A. You mean about buying it?

Q. Yes?

A. Sure, we talked it over, buying the farm and everything. The farm I moved onto was one hundred seven acres, about that.

Q. Did he say he would buy the farm if you came in?

A. Yes, he said he'd buy the farm if I'd come in and run it for him. We already had two hundred dollars down on our own farm and I didn't have enough lands.

Q. I want you to be specific and answer the questions so we don't have objections on this. As a result upon your agreeing to go on the farm of Mr. Dye and upon the adjoining lands, the condition was that Mr. Dye would then buy the farm at 1418 Grange Road?

(238)

A. Yes, that's right. 1418 Grange.

Q. Did you see Mr. Dye on August 26th of 1955?

A. Yes, sir.

Q. What time in the evening did you see him to the best of your ability?

A. I haven't got a watch. It must have been a quarter to seven, to seven-thirty. I don't know just what time it was.

Q. Were you shot on that day?

A. Yes, sir.

Q. By whom?

A. Clifford Dye.

Q. Is the Clifford Dye that you claim shot you, is he in the Court room at the present time?

A. Yes, sir.

Q. Will you point him out, sir?

A. Right over there.

Q. Let the record show that this witness has identified Clifford Dye. At this time you may take this witness for Cross-Examination.

(238)

CROSS EXAMINATION
Conducted by Mr. Smith:

(241)

* * * Q. So far as this ownership of the farm, have you any basis now that you would like to give us to explain any possible inference as to why you think Mr. Dye was the owner of the farm instead of his sister?

(242)

A. Yes, I have.

Q. Tell us what it is.

A. Clifford Dye and I always had long chats together. He told me at the fence, by our white fence, that he had this stuff in his sister's name, that he had — I don't know, something about his wife or something. I didn't care too much about talking to him about it. That's the way he talked to me. He was putting this stuff in his sister's name and that she is a nice lady, and she is an awful nice lady. He always laughed and said his sister had his last penny in this farm. He always classified her as a

poor sister and he kind of laugh, and walk away from it. I didn't care what Mr. Dye's, whose name he had it into, so long as we were getting along and no trouble.

Q. Did you have any misunderstanding as to what farm you were leasing?

A. No, sir. I had all the farms. I wouldn't have took any because that farm wouldn't handle the cattle for two people to make a living on. That was the agreement between Mr. Dye and I, to take all the land. I wouldn't attempt to move on one hundred seven acres.

Q. I notice this lease provides description of farm. I'm reading paragraph A of the lease. "In consideration of the agreements and stipulations hereinafter set forth to be kept and performed by the tenant, the landlord hereby leases to the tenant to occupy and use for farming purposes his farm of about one hundred acres." His is in printing, not in typing. "Incidentally known as the Sloan farm, situated in the County of Oakland, State of Michigan, and described as follows: Blank. Exceptions, if any: No boating, fishing, hunting or trapping rights." Now, that refers only to the farm you actually occupied during the time you were there does it not?

A. Yes, sir, in that paragraph.

Q. Now, at the last portion of the lease, over separate signatures of Viola Dye by Clifford B. Dye, Attorney-in-fact, Lois C. Clark and William C. Clark, there appears in typing this clause: "It is a condition of this lease that all feed for dairy cattle should be produced by tenant on farm covered by this lease, and such fields of the farm adjoining on the east and the other farm of the landlord in White Lake and Hartland Roads in Tyron Township, Livingston County, Michigan, as may be designated by the landlord. All crops so produced shall be limited to the feed requirements of the dairy herd, other than such exceptions as may be agreed to by the parties jointly. And the parties shall jointly stock the farm covered by this lease with sufficient dairy cattle to adequately consume and utilize the feed so produced on all three farms and the dairying facilities of said farm." Now, from that was it not your

understanding that you were to have the privilege of putting in crops on either this farm occupied by Mr. Dye, that being the farm on the east of the Tyron Township farm, I think we have referred to it as the White Lake Road farm for the purpose of producing feed to take care of the dairy herd on your farm wasn't that your understanding?

A. Yes. Well you're trying to feed cattle, Mr. Smith. We had lots of cattle. The farm would never at that time, Mr. Dye's farm would never raise feed to milk that bunch of cows alone. I had cattle in all three farms. I raised feed and left it in the barn and fed the cattle.

Q. Isn't that clause that I just read to you, the clause that perhaps you had in mind when you said that you had leased all three farms?

A. We talked it over before we signed the lease and I had other farms rented besides that in the county — a couple hundred acres besides the land that Viola and Clifford Dye owned.

(244)

Q. At the same time you were operating the Dye farm?

A. No, sir, I took them over after I took the Dye farm. I had them, the same year, to raise feed for the cattle. The farm couldn't raise the feed of two hundred forty acres about.

Q. So arrangement was made to tenant crop some adjoining farm nearby?

A. Yes.

Q. We are concerning ourselves now primarily with this particular lease. It appeared to me and I want you to tell me if you thought was any different, that as to the White Lake farm and Mr. Dye's residential farm, lying east of yours, that you contemplated only the right to plant crops on those farms if you thought they were going to be needed to feed the dairy cattle up on your farm, as distinguished from the right to occupy the buildings or insist upon any other rights on those respective farms.

A. All I got to say, the farms was mine. I could do what I wanted to do with them and plant what I wanted to do with the field and seed them. There was no trouble

about that field, or that field should be plowed. I had the farm. Everything I done was all right with Mr. Dye.

Q. How did — how long did that exist, anything you did was agreeable with Mr. Dye?

A. Everything was agreeable with Mr. Dye when he went to Florida last February or a year ago now.

Q. That would be February of what year?

A. '55.

Q. Now, my real interest was when did they cease to be agreeable?

A. Oh, Cliff and I always had a few spats here and there and I always got on my tractor and drove off and left him. I don't recall all the arguments I had with him. He'd pat me on the back and say, "Oh, Bill, you don't want to argue" and I said "That's right. I don't want to argue." I thought he was a smart man and I thought I would like to settle with him like any man.

(245)

Q. At the end of the first year there was an accounting wasn't there?

A. There was an accounting the first of the year and the dissatisfied party was to be satisfied by the first of February of any year.

Q. Weren't you supposed to do an accounting every month?

A. Yes. Every Sunday Mr. Dye and I went and counted the cattle. We went on several Sundays. If we weren't busy and he wanted to go.

Q. At the end of the year you gave Mr. Dye Exhibit F which I am now handing to you, did you not?

A. Yes.

Q. And he accepted that promissory note for what is it?

A. Thirty-seven hundred ninety-six dollars. The third day of the tenth month of '54.

Q. Actually, if you read that more carefully, it would be March 10, 1954, would it not? Third month, tenth day?

A. Yes.

Q. Was that note given as the result of an accounting which appears as Exhibit E?

A. Mr. Smth, these are papers that we asked for in the last Court case and we could never find them.

Q. Well, you found them now.

A. These are the papers that Mr. Dye denied that he had of our bookkeeping when we had the last trial.

MR. TAYLOR: Was that in trial?

A. Yes, sir. That note was even in and other papers were these papers.

THE COURT: Witness, you will have to restrain yourself to answer the question.

Q. I can reframe it. Was that note given in pursuance of the settlement as depicted by Exhibit E?

A. On some of these things, yes. This is what I kept track of every time. Just one thing. Yes, yes, this covered some of it.

Q. That isn't in your handwriting is it? Isn't that your wife's handwriting as to one sheet and Mr. Dye on the other sheet?

(246)

A. This is a statement that my wife and I kept at the house.

Q. Whose handwriting is it in please?

A. I couldn't say whose it was in, sir.

Q. You don't recognize the handwriting?

A. It is Mr. Dye's or I believe it is mine. I don't do too much writing.

Q. Are you at all familiar with your wife's handwriting?

A. No. You mean to watch her write or anything?

Q. Do you know whether or not that first sheet is in your wife's handwriting?

A. I wouldn't say if it was or wasn't, Mr. Smith.

Q. Have you any memory of the occasion when you, your wife and Mr. Dye sat down and went over these figures and ultimately drafted the note that took care of the settlement?

A. Mr. Dye and I done a lot of that between ourselves. Sundays he might have a couple hours. We'd draft it. We didn't take the number of cattle every month. Cliff was busy. When we wanted to we went together and got it. I had bought four or five-hundred dollars worth of cattle.

at the time and gone to his office and kept track of it ourselves. I couldn't tell you whose writing it is, whether it's his handwriting or the secretary's or anybody.

Q. Do I understand you have no memory of any such settlement meeting consummated in this note?

A. Yes. One day, yes, we had meetings.

Q. Tell us about the meeting and in which those figures were digested and this note was issued.

A. As near as I can figure offhand, this was brought up one time at my house and Cliff, when he got — I don't know, it was after he come home there about the time I signed that note. We talked over things and we had a few difficult arguments. We sat at my table and drank coffee and talked this thing over. One time we went down to his house. Several times we went down to his house and talked it over with him. Sometimes he'd come to my house (247) and sometimes I'd go to his.

Q. Now, after this particular account of March 10, 1954, was there any subsequent accounting?

A. What do you mean by that, Mr. Smith?

Q. Later on, did you have any further accounting or settlement with Mr. Dye?

A. Yes, we had several accountings. Mr. Bremer and Mr. Dye and my lawyer and we went round and took two or three accountings of the farm, inventories and things like that through the past year.

Q. That would be after the lawsuit was started, would it not?

A. Yes.

Q. You haven't been in the Courtroom of course, but at some time or other we introduced the file in a case instituted by Viola Dye through Mr. Dye, her brother, against you and your wife in what is known as an accounting suit. Do you recall that suit?

A. If it has been filed, I must have got it, Mr. Smith. I don't know. I got a lot of suits or some kind of papers was served on me.

Q. Maybe I can help refresh your memory a little. Do you remember where you were when you were served with those papers?

A. Yes, one time I was planting oats and I believe one time I was at the elevator getting feed down for the cattle; one time I was gotten out of bed at two-thirty in the morning and had a paper served on me.

Q. At this time there would have been an injunction and a summons served on you. Do you remember where you were when that injunction was served on you?

A. I wish I could help you but I don't remember.

Q. Do you remember what you did with the injunction when it was served on you?

A. If I could just recall it. I must have given it to my attorney.

Q. In the first instance what did you do with it?

MR. TAYLOR: I didn't understand that he even remembered (248) receiving it.

THE COURT: I think he may answer the question as submitted.

Q. To be a little more specific, were you in a tavern in Holly at the time that injunction was served on you?

A. I don't know if it was an injunction or not. My hired man and I was in the tavern there — Mr. Heiple — talking to a couple men. I was served a paper. I never read it. I took it home and give it to my attorney.

Q. State whether or not you threw it on the floor of the tavern.

A. I wouldn't say I threw it on the floor. My attorney has the paper I was served with.

Q. In the first instance did you throw it on the floor?

A. I wouldn't say. Let's see who served the injunction.

Q. If it would be helpful, I think it was Mr. VanHousen.

A. I don't remember throwing any injunction on the floor or paper or anything. I believe my attorney has the injunction.

Q. Yes. I assume now that sometime between the time you say Mr. Dye went to Florida in February of '55 and the time this lawsuit was started, there had to be a sort of breaking apart of you two men, isn't that right? You had some hard feelings had to develop between there?

A. No hard feelings between brother Dye and I until he started threatening me with a gun.

Q. When was that?

A. When he got to serving all these papers and taking me to Court. When Cliff went to Florida, we took care of his house, and kept his furnace up for him. I had no hard feelings against Mr. Dye.

Q. How long was Mr. Dye gone?

A. I couldn't tell you. Five, six or seven weeks.

Q. When he came back, what happened?

A. He was the same old Cliff. Pat you on the back today and raise heck with you tomorrow. • • •

(254)

Q. On August 26th, did you consider yourself on friendly terms with Mr. Dye, prior to the shooting episode of that evening?

A. Yes, me and Cliff. I didn't figure there was anything upstairs in the Court House. We shook hands and in front of the Judge and I believe Mr. Bremer was there at the time and there was no hard feelings. • • •

CROSS EXAMINATION

(265)

Q. When you first came down, did you first see Mr. Dye —

A. His car sat by the barn. I knew he was home.

Q. You didn't see Mr. Dye by the milk house did you?

A. No, sir.

Q. Well, do you — now where was Mr. Dye when you first saw him that night?

A. I put this cow, it was kind of a pet. I got her calf up and got her heating and started out the door with this kerosene rag in my hand to get the other calf in there so one wouldn't take it all so I could get her fed. When I walked out of the barn, I noticed my wife was standing at this side of the gate and Mr. Dye was standing at the other end of the barn by the other door.

MR. TAYLOR: I was going to suggest at this time that we take the usual recess.

THE COURT: We will recess for fifteen minutes.

(Recess).

Q. Mr. Clark, I will show you People's Exhibit seven and ask you whether or not you recognize the man appearing in that picture as depicting a position where you and Mr. Dye fell on the ground outside the gate between the gate and Dye's house?

(266)

A. Somewheres right around there, Mr. Smith, or a little bit this way. In the barnyard your gate is open a little too far now. The gate was open just enough for Mr. Dye to slide into.

Q. Did you have a hold of Mr. Dye at the time he went down.

A. When we fell to the ground?

Q. Yes?

A. Yes, I was trying to get that gun.

Q. How did you have hold of him?

A. I had hold of his arms.

Q. At the time he fell were you two men facing one another?

A. Yes, sir.

Q. Would you mind stepping down here and demonstrating to me how you had hold of Mr. Dye at the time he fell?

A. When we went down?

Q. How did you have hold of Mr. Dye at the time he fell?

A. He had his hands up — by that time I had his hands up like this here. We went down together. We got tangled with the gate.

Q. You had hold of his wrists and as Mr. Dye fell, you fell on top of him or at the side of him, something of that nature?

A. Yes, sir.

Q. Was the gun discharged at that time?

A. No, sir. I couldn't say if it was. At that time that Mr. Dye and I fell, the gun was — we was on the ground.

Mr. Dye —

Q. I am not asking you about when you were on the ground please. I am particular concerned as Mr. Dye was in the process of falling.

A. Falling to the ground?

Q. Yes.

A. When we was getting through that gate we got tangled up in the gate.

Q. What happened then?

A. We just went to the ground and Cliff was trying to get hold of the gun all the time. I finally got his arms up where I thought I could hold him until I got a few pains and I figured I was shot (267) and I figured the best thing was to get out to there.

Q. While we are on that subject, did Mr. Dye yell for help on that occasion while he was on the ground?

A. No, I never heard him holler for help. He was after the gun again.

Q. After you discovered that you were shot did Mr. Dye offer to take you to the hospital?

A. I couldn't say he did, sir. Things happened so fast I never heard nothing about him offering to take me to the hospital. He might have said it. I wouldn't be sure. I don't recall.

Q. How close were you to Mr. Dye when the last shot was fired?

A. Well, I say between fifteen and eighteen feet.

Q. Where was this last shot fired?

A. It missed my head. It went right along the side of my head to where my wife was standing.

Q. Where was Mr. Dye when the last shot was fired?

A. I guess he was somewhere in the same place where he was when we first started.

Q. Down by the northeast corner of the barn?

A. We was standing, both the way — we was facing each other and the barn was like this. We were standing face to face.

Q. By the northeast corner of the barn?

A. With the barn, yes, sir.

Q. That's where the last shot was fired?

A. Yes, sir. I was about fifteen or eighteen feet. I seen the fire come out of the gun.

Q. Did you tussle with Mr. Dye up the hill towards this gate?

A. I guess we had to. I don't remember. I don't just recall what I did. I know I had hold of him and my wife picked the gun up. Mr. Smith.

Q. How many shots were fired?

A. I could count three. I know of three of them. I couldn't say if there was any more or there wasn't. I know of three shots. • • •

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(280)

GUS CHILDRESS, a witness for the People, being first duly sworn testified as follows:

DIRECT EXAMINATION

(281)

Conducted by Mr. Taylor:

• • • •

Q. When did you first come in contact with lawyer Dye?

A. Back in the back-end of his place, duck hunting. • • •

Q. You were down there duck hunting and what happened at that time?

A. Well, I wasn't alone. I was with another man and we was shooting ducks and we heard somebody holler "Get out". We went down the marsh a little ways and came out in the cornfield and then Mr. Dye come around and introduced himself and told us that he, well, he told me he asked me if I was the man that lived in the adjoining farm and I told him I was and he advised me that he didn't want me to trespass him. He said he wouldn't trespass me. • • •

(282)

• • •

Q. Is there any conversation about striped pigs?
A. Yes, there was.
Q. Who?

(283)

A. He was asking me about his pigs and I told him I did see his hogs run out because they had pastured backwards and forth — Bill and I was good neighbors and we never squabbled about whose cows or whose hogs got out and went on each other's farm. If mine got on his, he always called and I called him. While I was telling him that I saw the hogs I think it was about a week before that he was over there and I saw him out in the lane headed toward the road and the boy went over to the — there is a little pump house. The boy went over and just beyond the pump house there is a garage and Mr. Johnson had some hogs that was in that garage. There was a big pasture. They come in the garage to lay and the boy looked at the man, he said, "Mr. Dye, here's some pigs. One is striped, just like yours."

Q. Now, did you and Mr. Dye then go on to have some conversation about the Clarks?

A. We talked.

Q. Did you talk while you were out in the barnyard or did you talk while you were in the car about Mr. Clark?

A. Both places.

Q. What did Mr. Dye say about Mr. Clark or Mrs. Clark?

A. Well, we was first, he asked me about the corn the farm owed me. Well, back in the summer before last Mr. Clark came over and he was short of feed and they got around two hundred bushels of corn and he told me that he'd give it back to me.

MR. SMITH: Mr. Clark did you say?

A. Mr. Clark. And I got one load back and then last summer they got another load and I saw Mr. Dye. I went to Mr. Dye's office and he asked me about the corn and he told me to not worry about it, that they'd make it good. This was before they had any trouble, and he told me he asked me how did Bill and I get along. I told him "Fine," and he said "Don't worry about the corn," that I would get it and then on this particular day he was (284) dis-

cussing the corn again and I told him that Mr. Bremer was over to the house and he said that they would pay me after they had this farm settlement and I was told that I was supposed to get paid but I never did and he asked me would I take a call for the debt and I told him probably if we could think alike. He took the boy home first. I guess he took him home. He was gone about five minutes. He drove down the road and came back, and then we got in the car and went to the White Lake farm and looked at the calf and we didn't get together on the price. I told him I would take the calf for the corn and he asked forty dollars to boot so we didn't get together on the deal and he asked — well, I, he was telling me about the pigs and the cows that was lost that they never found them and I told him the State Police had been out to my house and they had a complaint that they said that it was overheard in a conversation that we had his cattle and pigs was locked up down to my place. This was the State Police telling me this.

Q. Did they say who made that complaint?

A. Mr. Dye.

MR. SMITH: I ask that be stricken as hearsay.

THE COURT: It may be stricken and disregarded by the Jury.

Q. Go ahead.

A. They got permission to go and look in the barn. They said if they wasn't at my place, probably they was next door.

Q. Is the man next door white or colored?

A. He is a colored man. They got permission to search both farms at their own will without any assistance.

Q. In other words you gave them permission without any writ or anything?

A. Yes, they could search the whole farm, and I don't know whether they went and looked. I don't know whether they went to my barn or not but they had the privilege and I don't know whether or not they went to the other barn of Johnson's, but as we went (285) over to this other farm

Q. In the car?

A. In the car. He asked me did the State Police ask about the trouble between him and Bill and I told him they

didn't. I never said anything about the trouble that came up between him and Mr. Clark. He was talking about the trouble. He said Mr. Clark was a pretty shrewd liar.

Q. Do you know what a tape recorder is? Do you know what they are, something like this thing here. Did you see one of those in Dye's car?

A. No, I didn't.

Q. Did you see the glove compartment open?

A. Yes.

Q. Did you look in there?

A. No.

Q. What else was said about the Clarks, about her lying and so forth?

A. He said she was a pretty shrewd liar and he asked me if I could say that I knew that Bill was a big liar and I told him I couldn't, and he asked me had I ever heard Bill threaten him in any way to the effect that he would take vengeance against him and I told him I hadn't. In fact I didn't even know they was having trouble. He never related any trouble with him and Mr. Dye until after all of this happened.

Q. Did you ever see Bill in any fights or in any trouble?

A. Not at all.

Q. You lived right close to him for a long time. As a neighbor, how did you find him?

A. Very true and a very good neighbor. We worked together and we used tools backwards and forth. If I had something he wanted, he'd come over and hook to it and vice versa. In fact I helped him get up about I don't know several thousand I'd say, I wouldn't say several thousand, I'd say roughly four or five thousand, maybe, bales of hay (286) that he cut that he got from another farm and we hauled it onto the White Lake farm. We never had any trouble, no misunderstandings.

Q. Were you able to observe the Dye farm while it was under control of Mr. Clark, that is, as to the planting and so forth while Mr. Clark was on it?

A. Yes.

Q. How long have you been farming, sir?

A. Ever since I was big enough to remember.

Q. Would you say that Mr. Clark here was a good farmer?

A. Excellent.

Q. Would you say he took care of the Dye farm in good manner?

A. I would say he did.

Q. And the cattle, would you say that he cared for the cattle in the proper way?

A. Very well. They was all fat. Every time I was in the barn, they looked very well.

Q. As to Mrs. Clark, did you see her working on the farm?

A. Lots of times.

Q. Both of them working together?

A. Yes, sir.

Q. Did you ever at any time see anything neglected on that farm?

A. No.

MR. SMITH: Ask him if he knows anything about the case at hand.

Q. Do you know whether or not Mr. Dye went from one neighbor to the other asking whether or not they knew Mr. and Mrs. Clark were liars?

A. No, I don't know.

Q. Take the witness.

CROSS EXAMINATION
Conducted by Mr. Smith:

Q. Do you know anything about the case that we are to try?

A. You mean the shooting?

(287)

Q. Yes?

A. No.

Q. That's all.

MR. TAYLOR: That's all, thank you, sir.

• • •

(288)

MR. TAYLOR: Exhibit 22 is the transcript that was submitted of Mrs. Clark of the Examination — what was taken in Justice Court.

THE COURT: That has already been admitted.

MR. TAYLOR: Twenty-four is the law case 38462 involving the ten thousand dollars lawsuit arising out of the assault and battery.

(289)

THE COURT: It has been received. • • •

MR. TAYLOR: If the Court please, at this time I offer as Exhibit twenty-five testimony taken at the Examination and the Cross Examination, Direct and Cross Examination of William Clark so that would complete the entire transcription of the Examination which took place way back in September 29th.

MR. SMITH: If the Court please, you mean Mr. Clark here?

MR. TAYLOR: Yes.

MR. SMITH: He was a witness. It's improper to put in testimony by deposition or otherwise or prior record if the party is available as a witness. He is the witness that just got off the stand.

MR. TAYLOR: If the Court please, Mr. Smith used part of this record in the Cross Examination as to excerpts at the time this Examination took place. Mr. Smith had an opportunity to Cross Examine and the testimony of the witness months ago where there has been that opportunity and it has been used, it would be admitted on the same basis as the testimony of Mrs. Clark which has already been admitted.

THE COURT: Exhibit twenty-two was that portion of the testimony of Lois Clark. That was admitted without objection. Are you now offering the testimony of the witness Mr. Clark taken at that Examination?

MR. TAYLOR: Yes, Your Honor.

(290)

THE COURT: How do you feel it is material to this cause?

MR. TAYLOR: I feel it is material in this respect, that is, there is an opportunity here for this Jury to compare the Examination testimony with the testimony that has been given today and they can make comparisons and it has been used. It is an Exhibit; it is material to the issue involved.

MR. SMITH: If the Court please, I have stated my position that the man is here as a witness. If there was any question asked relating to the record, I'm sure we read into the record all that pertained to it. Otherwise counsel would have caught it up and followed it up by saying "Didn't he also testify — " I anticipate that this purpose of this is to try to get substantiative evidence to the Jury once from a record made at the Examination wherein the witness would find it very difficult to testify the same way today and thus keep me from Cross Examining the witness in the light of what we now know. Therefore I say it would create a miscarriage of justice if the Prosecutor were to be permitted to put into evidence any record, be it an Examination, a deposition or testimony of a former trial. In view of the fact that the witness is available and was here —

MR. TAYLOR: The question was brought up.

MR. SMITH: I will say further, I haven't any objection. You haven't closed your case. *If you want to put your witness back on the stand and ask him about the shooting or whatever you want to, I haven't any objection to that.* (Emphasis supplied).

(291)

MR. TAYLOR: If the Court please, we are not on that particular subject now. We are on the question of the offering of People's proposed Exhibit twenty-five.

THE COURT: Testimony taken at the Examination other than that of Mrs. Clark. This matter is undoubtedly of some consequence in this cause and the Court will reserve decision until Tuesday morning. You may proceed on the rest of your case, or rest if you wish. * * * This

case will be adjourned and I am speaking to the Jury now in particular, until nine-thirty on Tuesday. * * *

PROCEEDINGS HAD FEBRUARY 12, 1956:

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* * *

MR. TAYLOR: * * * That completes the People's case and we rest.

(Jury leaves courtroom).

MR. SMITH: At this time I move for a directed verdict of not guilty for the reason that the testimony submitted by the prosecution (296) in the presentment of their case has failed to present evidence which the Court could under any circumstances construe as evidence sufficient to find the respondent guilty. * * *

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(323)

DONALD J. BREMER, a witness for the Respondent, being first duly sworn, testified, in part, as follows:

* * *

CROSS EXAMINATION
Conducted by Mr. Taylor:

(332)

Q. Mr. Bremer, when and where did you pass the Bar?

A. I passed the Bar, you mean where I took the Examination?

Q. From which school did you graduate?

A. I graduated from Michigan State College. I have a Bachelor of Science.

* * *

(333)

Q. I am talking about law degrees.

A. I have no law degree. I took a four-year course at a private law school.

Q. What school was that?

A. A school given by Judge Leland W. Carr, Judge of the Supreme Court.

Q. At least he was your proctor. You did not go to law school?

A. They were not conducted that way. We had nightly classes from seven to eleven for four years.

Q. That course however is not recognized by the American Bar Association is it?

MR. SMITH: I object to that.

MR. TAYLOR: This is Cross Examination. This man has testified to all his qualifications. I have a certain right to go into it and show the background and his education as to whether or not he is able to testify as he has.

MR. SMITH: If the Court please, I think his testimony has been as far as I am concerned primarily characterized by his Police experience. Nevertheless, whether a man took a four year course in Judge Carr's schools that he used to conduct or took it at the Detroit College of Law, taught by practicing attorneys in Detroit, makes no difference to the issues in this case.

THE COURT: That is very true but you qualified this man as an expert and I think counsel is entitled to ask this question. If the witness knows the answer of his own knowledge —

MR. SMITH: May I have the question again?

Q. Do you know of your own knowledge whether or not that course is an accredited course and is accredited by the American Bar Association.

(334)

MR. SMITH: Just a minute. Before that question is answered I'd like the record to show through some affirmative evidence that the American Bar Association either does or has any authority to accredit any school for anything.

MR. TAYLOR: If the Court please, this Court will take judicial notice of the American Bar Association from this Court's past experience as passing on colleges and those colleges which are accredited by the Bar Association. If this man has some back experience that Mr. Smith doesn't want to bring in —

THE COURT: Let's not discuss the matter further. The Court ruled the witness may answer the question if he knows it of his own knowledge.

A. I would like that question more plainly stated. Are you talking about the present time or when I took that course twenty-one years ago?

Q. At any time.

A. I don't know. • • •

(343)

Q. By the way, while you were Chief of Police with the City of Holly, did you beat someone with a blackjack?

A. I may have struck someone with a blackjack in the performance of my duties, yes.

Q. Do you know as a matter of law, under Michigan Statutes, the Michigan Penal Code that it is absolutely a crime to even carry a blackjack?

MR. SMITH: If the Court please, I submit there is no such law.

THE COURT: The question is whether the witness knew or not. He can answer that question.

Q. Do you know whether or not there is a Statute under the Concealed Weapons law under the Michigan Penal Code, Act 328, Public Acts of 1931, that being in the possession of a blackjack is a crime? You can answer yes or no.

MR. SMITH: Just a minute until I interpose an objection. Counsel I think does know it doesn't apply to Police Officers. If he doesn't, I submit that the Act should be put in evidence. What counsel is trying to do is to embarrass or prejudice this Jury against the witness. It has no bearing on the case whatsoever. There is no question of violence on the part of this man. Even as a Police Officer or otherwise. It has no helpful or gainful purpose in this lawsuit.

(344)

MR. TAYLOR: It has from this standpoint, if the Court please, that this man has taken the stand and has been qualified as an expert in Police work and it is on that basis that I am questioning him and Cross Examining him, showing the amount of his ability and past experience as to whether or not he could use good judgment in other things which have been brought out in this trial. I contend it is material, relevant and competent. If he knows he can answer yes, or no.

THE COURT: The Court fails to see the relationship between the witness' knowledge of the law in reference to blackjacks and his credibility or any relationship to the affair that we are concerned with in this case. If the witness does know the law, he may answer yes or no because it is of not too great significance and not prejudicial. I think the matter should not be pursued too far. Can you answer yes or no to that?

A. Will you repeat the question please?

MR. TAYLOR: I will withdraw the question. • • •

(345)

• • • Q. Mr. Bremer, isn't it a fact that you are a co-partner of Dye?

A. Not in any sense of the word.

Q. Weren't you invited by Mr. Dye to come to his office so he could teach you the type of negligence law that he has been practicing?

A. That isn't true. • • •

(346)

• • • Q. You know as a matter of fact as an attorney and you heard the testimony here, spoken by Mr. Clark and Mrs. Clark that Dye says "If you got Lodge, I'm going to make you pay for it." You know how many times you have been to Court too, don't you?

A. Yes.

Q. You know how much it costs don't you when you hire an attorney to go into Court?

A. That's right. • • •

(347)

• • • Q. Have you ever seen Viola Dye?

A. I do not believe so, no. I have talked with her on the phone but I never saw her. • • •

Q. Do you know of any property of your own knowledge or any legal work you did for Mr. Dye where he had the property in his own name?

A. Do you mean this property?

Q. Any property?

A. No, I don't believe I do.

Q. As a matter of fact did Dye tell you that he had this property in his sister's name so that if there was anyone that sued him, whether or not it was Clark or anyone else, that they'd have to go down to Louisville and serve Viola Dye?

A. Did you mean in his own name or the name of Viola Dye?

Q. I am talking about Clifford Dye.

MR. SMITH: The witness gave you a good suggestion if you'd listen to it.

MR. TAYLOR: I'd be glad to take some suggestions from Mr. Bremer. Probably I misquoted myself. Do you know of any property that Mr. Dye owned in his own name?

(348)

A. No, I don't. You mean real property? • • •

(349)

• • • Q. Did you discuss with Mr. Dye as to when you thought he should enlighten the Police about what happened on that night so that they could proceed in an orderly fashion?

A. I had no opportunity to talk with Mr. Dye until the next day I believe around noon or ten o'clock in the morning. • • •

(350)

• • • Q. I informed you did I not, with the reporter, when I was going to take a statement from Mr. Dye if he wanted to make a statement didn't I?

A. I won't dispute you on that. I don't know. * * *

Q. Do you know as a matter of fact or had you learned that the Police never up to this time until Mr. Smith made his opening statement as to what actually transpired, at any time as far as Dye was concerned, knew —

A. You mean as far as Dye's statement is concerned?

Q. Yes.

A. I don't believe he has made a statement.

MR. SMITH: Perhaps I am rather late in making this observation but the persistence of Mr. Taylor prompts me to make it. I think it would be highly improper for the Prosecutor to make any comment even though it were true that the respondent refused either to testify in Court or to make a statement or to testify at an Examination or make a statement in connection with an Examination. Actually it would be reversible there. If counsel will terminate that line of questioning when he gets satisfied, without too long a delay, I want to assert —

MR. TAYLOR: There are good law admissions of any kind.

* * *

(351)

MR. SMITH: Yes, but you are not talking about admissions. You are complaining because the man wouldn't make a statement and didn't testify and so forth.

MR. TAYLOR: If the Court please, there is good law to support the theory under the rule where admissions of any kind or omissions where a person sits by silently, when they are being accused in their presence and all of the facts, acts, circumstances are all part of the res gestae of a criminal case. However, Mr. Smith objects to it. I will cease that —

THE COURT: I think it is improper to draw any conclusions from the respondent's decision not to testify.

MR. TAYLOR: I haven't mentioned anything about testifying.

THE COURT: You are approaching the situation and it is dangerous ground I will concede.

MR. TAYLOR: I'd like the record to show that I never made any statement about testifying at any time.

THE COURT: That is quite true. You have not.

Q. In your Police work, Mr. Bremer, generally did you find that when you went out to investigate, that people generally told you what happened? Is that right?

A. They'd give a version, yes, of what happened.

Q. And if they refused to give you any version, did you arrive at any conclusion in your mind?

MR. SMITH: I object to that as incompetent, irrelevant and immaterial.

MR. TAYLOR: I withdraw the question. • • •

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(361)

CLIFFORD B. DYE, (Respondent), a witness for and in his own behalf, being first duly sworn, testified, in part, as follows:

DIRECT EXAMINATION
Conducted by Mr. Smith:

• • •

(394)

Q. Let us concern ourselves for the time being with acts of violence that you knew about prior to, on the part of Mr. Clark, if you please, that you knew about which were not directed at you but you knew about, on or before this so-called shooting of August 26, 1955. • • •

(395)

MR. TAYLOR: Just a moment. If the Court please, by counsel's own interrogation and the formation of the question he is asking his own witness to testify to something someone else told him. Unless it can be established that Mr. Dye was there and saw these things, then it would certainly not be admissible and he would have no right to rely upon anything of that nature.

A. I believe I can tell what Mr. Clark told me.

THE COURT: Witness can testify as to those matters which he observed and which he was told by Mr. Clark but he can't repeat hearsay.

MR. SMITH: If the Court please, in any case where the element of self-defense is involved, the state of mind of the so-called assailant, in this case would be Mr. Dye, at the time of the alleged assault becomes material and important. It is the state of mind of Mr. Dye. That is the primary reason why information which has come to him upon which he believes at that time is material. For that reason, I submit that the witness is entitled to testify to any acts of violence which had come to his attention, be it by hearsay or otherwise which he relied upon and had in his mind on August 26, 1955. The time of the alleged offense herein involved —

(396)

MR. TAYLOR: • • • If the Court please, if there is such a rule, it is a new rule to me. It would be a definite violation of hearsay rule and unless there is an excluding rule or another rule to get the testimony in before I would withdraw my objection I would have to definitely see some law on it.

THE COURT: Can you quote to the Court the authority, Mr. Smith?

MR. TAYLOR: If the Court please, Mr. Smith could go on with some other things. It's twenty minutes after four and he will have all day tomorrow to do that and he could still continue on some other phase of the Direct Examination.

A. Mr. Smith —

THE COURT: Before you answer any further, if you care to talk to your counsel in confidence, it is all right but you are on the witness stand now.

A. That's right. I am not used to being in this place here. I'm usually out there.

THE COURT: I suggest to counsel this is a rather important matter which seems to be of a somewhat novel nature. I am sure that respondent's counsel would like to offer his testimony. I am equally sure that Mr. Taylor, representing the People would not like to have it

offered. We have only ten minutes to go so supposing we adjourned at this time. • • •

MR. SMITH: That is satisfactory. May I make one statement because I assume Mr. Taylor will be (397) checking his law too. There are really two theories on which that type of testimony is admissible.

THE COURT: Gentlemen, I think we had better not argue in the presence of the Jury on a rather technical matter because it might be an informative matter that both of you would prefer not to have the Jury informed of. • • •

PROCEEDINGS STARTED ON FEBRUARY 23, 1956

(Mr. Dye still on the witness stand).

DIRECT EXAMINATION (Continued)
By Mr. Smith:

(400)

• • • Q. • • • What was the conversation that Mrs. Stone had with you in February of 1955 with reference to any act of violence on the part of Mr. Clark?

MR. TAYLOR: Now, that is where I make an objection, unless, until it is established that the (401) assault was made upon the woman herself. What is made on a third person, other than herself, then it would be a violation of the hearsay rule.

THE COURT: Objection sustained.

Q. You mentioned other instances where parties had talked with you prior to the time that you had any conversation with Mr. Clark?

A. Yes, sir.

Q. Without going into any detail of the conversation whatsoever, let's take them one by one. Get the approximate date and limit yourself only to the conversations that pertained to acts of violence on the part of Mr. Clark.

A. Shortly after the assault I testified about in May that Mr. Clark committed upon me —

MR. TAYLOR: If the Court please.

MR. SMITH: I am just trying to create a record now. You will be so kind — sometime in May?

A. Yes.

Q. May of 1955?

A. That's right.

Q. Who did you talk with and where?

A. Mr. Bremer told me —

Q. No, it isn't what he told you. You had a conversation with Mr. Bremer?

A That's right.

Q. Was that concerning an act of violence?

A. Concerning an act of violence on the part of Mr. Clark toward —

THE COURT: Wait a minute.

MR. SMITH: When I am trying to create a record, let's not do something wrong here. In that particular instance, did you have any subsequent conversation with Mr. Clark on the subject matter that you say you were informed (402) of from Mr. Bremer?

A. Not concerning the specific instance that I had in mind at that time.

Q. All right. So then it is no. Will you cite other individuals who had conversation with you prior to August 26, 1955, with reference to an act of violence on the part of Mr. Clark?

A. Bob Brown.

Q. Time? And place please.

A. That would have been in the early part of February, 1955.

Q. Another instance, if you have any. First, on this Bob Brown instance. Did you later talk to Mr. Clark on that?

A. I later talked to Mr. Clark on that.

Q. Another instance.

A. I related Mr. George Dahon did I?

Q You did one. We didn't follow that up. When was that conversation?

A. That conversation was, would have been perhaps along in May or June of 1953, shortly after Mr. Clark came on my sister's farm.

Q. Did you subsequently talk with Mr. Clark about that?

A. Yes, sir.

Q. Any other instances; you mentioned another woman besides Mrs. Stone, I don't recall who.

A. Mrs. Swarthout.

Q. When and where did that conversation take place?

A. That occurred along in the Spring I believe it was of 1954, along about the time of the tornado in Flint, shortly thereafter.

Q. Did you subsequently talk with Mr. Clark on that subject matter?

A. Yes, sir.

MR. SMITH: Inasmuch as the Court has ruled in one instance in effect I believe that this witness would not be permitted to testify to what these conversations were with third parties, we wish to respect the Court's ruling in each (403) instance and merely offer formally to introduce by this witness the testimony in each such instance that I have so identified.

MR. TAYLOR: If the Court please, I'd like to answer Mr. Smith in that respect that the People in this case have absolutely no objection to Mr. Dye testifying to anything within his knowledge anything, any act, fact or circumstance as to appearance upon which he could rely and that he would have knowledge of that appearance of that knowledge on or before August 26, 1955.

MR. SMITH: Do you mean by that that you don't object to Mr. Dye relating these conversations?

MR. TAYLOR: I didn't say that. I said if he had knowledge of it or there was an appearance of some kind, some act or circumstance. If he saw Mr. Clark out fighting in the street, he would have a right to testify to it. If he had actual knowledge of some act of viciousness — I certainly want the Jury to know all about it, but as far as someone might have told him or something, he might say, Mr. Dye could sit there all day and say John Doe told me Mr. Clark was a murderer and there would be no limit and we would have no way of proving it.

THE COURT: Your objection is well taken and no hearsay testimony will be permitted.

MR. SMITH: So the record will show my position on that, notwithstanding the fact that it has been previously discussed, we are of the opinion that the state of mind of the respondent at the (404) time of the alleged shooting has a legitimate bearing on both the, upon the question of self-defense and also the secondary proposition of who was the aggressor.

MR. TAYLOR: If the Court please, we go along with that, that we do believe that the state of mind of this defendant at the time he acted and at the time we contend this crime was committed is definitely relevant, competent and material provided that the state of mind is based upon some actual occurrence, some actual knowledge, some actual appearance which came to him. I wouldn't like the record to show that the People here were opposing the fact that that is material from the standpoint of the defense.

THE COURT: In order that the record may be clear, Mr. Dye may testify as to those material matters which are within his knowledge or came to his observation. He may also testify as to those things relating to actual violence which Mr. Clark, the complaining witness may have told him but he will not be permitted to testify as to those matters which are strictly hearsay as to Mr. Dye. • • •

(438)

CROSS EXAMINATION
Conducted by Mr. Taylor:

(439)

• • •Q. From August 26th to this, to date is about six months is it not, Mr. Dye, since this eventful night?

A. Approximately.

Q. September, October, November, December, January, February. So on the 26th of this month six months will have passed at that time?

A. Yes, sir.

Q. And this is the first time in six months that you have made known to the People —

MR. SMITH: If the Court please, I think counsel is trying to insert prejudice in the case at this time.

MR. TAYLOR: These are facts if the Court please.

MR. SMITH: They may be facts and we wouldn't dispute them perhaps but there are certain limits within which you can inquire.

MR. TAYLOR: If you have grounds for your objection, state it.

MR. SMITH: Grounds for objection? Counsel has no right to ask questions or comment that this respondent was a witness at the examination.

THE COURT: That is true, Mr. Taylor, and your question should avoid that inference. You have no right to comment on his testifying or not. (440) If your question implies —

MR. TAYLOR: I didn't say "Testify". This is the first time he told any law enforcing officers as to what happened that night.

MR. SMITH: We might as well have it out at the start.

THE COURT: Are you planning on an extended argument?

MR. SMITH: No, I'm not. It has been discussed in your Honor's office.

MR. TAYLOR: This has not been discussed.

MR. SMITH: This particular question has not been discussed, no.

MR. TAYLOR: You were present at the Examination were you not, Mr. Dye, which was held on the 29th of September in Justice Court?

A. I was present at the Examination and I believe that was the day.

Q. And at that time Lois Clark testified both on Direct Examination, that is interrogation by myself and Cross Examination by Counsel did she not?

A. Somewhat differently than she did here at this trial.

Q. I am not asking for any comment Mr. Dye. I want just answers to my questions.

A. Answer to your question is she did testify.

Q. At that time, Mr. William Clark also was a witness for the People was he not or wasn't he?

A. I think you asked him two questions.

Q. I will be very careful about that counsel. On that same day did Mr. William Clark testify?

A. Yes, sir.

Q. Did he testify for the People?

A. You put him on the stand, yes, sir. I am not a criminal lawyer, Mr. Taylor. I am not trying to be funny or facetious. He testified. You put him on the stand and asked him some questions.

(441)

Q. Let's get to the point quick — not being a criminal lawyer. Were you not a Judge in Louisville, Kentucky for a period of four years?

A. I was a Magistrate.

Q. Isn't it a fact you handled twenty-four hundred ninety criminal cases?

A. No, sir. • • •

Q. From the periods of January 1, 1938 to and including December 31, 1941, isn't it a fact that you had while you were Judge of that (442) Court you handled 2490 criminal cases?

A. I wasn't Judge of that Court on any day you mentioned, Mr. Taylor.

Q. Well, when were you Judge?

A. January 1, 1933 to December 31, 1937.

Q. All right. Did you not receive a letter in response to a letter that you wrote to Mr. Young which reads as follows? "Dear Cliff" —

MR. SMITH: Just a minute. May I see what you are going to read before we go on.

Q. Permit me to refresh your memory of a letter that you received from Louisville, Kentucky. Will you read it? See if that will refresh your memory.

A. Yes, sir.

Q. Does that refresh your memory?

A. No, it doesn't change my memory a bit.

Q. Did you receive such a letter, sir?

A. I am not sure. I received a letter similar to that.

Q. Did that letter arrive as a result of —

A. Could I ask you what is the date of that letter and I can better tell you.

Q. The date of this letter is May 5, 1943.

A. Well, I couldn't remember exactly that far off as to the exact wording of it but it was a letter similar to that.

Q. You did write him a letter asking for information did you not?

A. Back in 1943. I believe I did or else called up or something. I asked him to write to me and give me some information about the number of cases, that I had handled in my Court.

Q. In that letter he stated that he checked the records — may I read the letter?

A. No, sir. I object to that. It has no place in this case at all unless my attorney is agreeable.

MR. SMITH: In view of your testimony, it certainly wouldn't be admissible. It covers a different period.

(443)

MR. TAYLOR: Regardless of the period, this man testified "I'm not a criminal lawyer" and we have a right to show that he has handled twenty-four hundred ninety criminal cases as a Judge.

A. I will answer the question if my lawyer wants me to.

MR. SMITH: No, it's argumentative. If it were true, it apparently isn't because it covers the wrong period. If it were true, it still wouldn't prove he was a criminal lawyer, whatever they are.

THE COURT: The witness testified he was a Magistrate from December, '31 to January '37. If that letter relates to that period, you may ask about it.

Q. During the period you were a Judge did you handle some twenty-eight thousand eight hundred eighty-two civil cases?

A. I wouldn't be surprised that I did but I didn't try a half-dozen criminal cases in the whole four years.

MR. TAYLOR: If the Court please —

THE COURT: It is already suggested to the witness he should be responsive.

A. I'm sorry. I apologize.

MR. TAYLOR: You know that these remarks are intentional, Mr. Dye.

A. No, they are not intentional. I realize I shouldn't. I will withdraw it. I will try my best to, I will answer briefly as possible, Mr. Taylor.

Q. Isn't it a further fact that during that period of time you handled one hundred forty-five thousand dollars in Judgment costs and fines?

A. I haven't the least idea. There was a whole lot but the Judgments and costs —

(444)

MR. SMITH: I think you have answered the best you can. Let's keep Mr. Taylor's answers right where he wants them — short.

MR. TAYLOR: Thank Mr. Smith.

Q. You are going to be well protected, Mr. Dye.

A. It looks like I am going to need it.

Q. So that when you state that you do not know anything about criminal law —

MR. SMITH: He didn't state that. He said he wasn't a criminal lawyer.

THE COURT: Finish the question, Mr. Taylor, before the objection is made.

Q. You say you are not a criminal lawyer?

A. That's right.

Q. Will you tell us then, does your criminal experience go beyond having handled two thousand four hundred ninety criminal cases?

A. I didn't try over a half-dozen criminal cases the whole four years I was in office, Mr. Taylor. I don't think I tried six even. Two or three maybe.

Q. Isn't it a further fact, Mr. Dye, that when you were Judge there, that the criminal laws of Kentucky parallel the laws of Michigan?

A. I haven't the least idea.

Q. Can't remember?

A. I haven't the least idea.

Q. Have you completely forgotten that?

A. I never knew that.

Q. You didn't know the criminal laws of Kentucky?

A. I knew what an ordinary practitioner would know.

Q. As a Judge you did not know the criminal law of Kentucky, sir?

A. Mr. Taylor —

Q. You can answer yes or no.

A. As a Judge or anybody, I didn't know. I was not a criminal lawyer and I did not know and thank God I realize I didn't think I knew, (445) all of the criminal law or any substantial part of it. I am answering your question, sir.

Q. * * * Did you know one Lawrence E. Higgins?

A. The name don't sound familiar to me. I don't recall the name at all presently.

Q. You don't remember that he was the First Assistant Commonwealth Attorney while you were in office?

A. I don't recall the name at all.

Q. The fact is that in Louisville you were generally known as "I am the law Dye." Isn't that true?

A. No, of course not.

Q. Now, your testimony is that you became Judge down there when?

A. I was elected Magistrate —

Q. I asked you when, sir?

MR. SMITH: Do you want when he was elected or sworn in?

A. I was sworn in January 1, New Year's Day of 1933, if I remember correctly.

Q. So that when you got this letter in response to your request as to how many cases you had tried down there, Magistrate Young was wrong in stating that the official records showed that they were from periods of January 1, 1938 to an including December 31, 1941, I don't want to lead you into a trap. I want to be frank and fair.

A. Yes, sir. I didn't hold office after, during that period, Mr. Taylor.

Q. As I say then, his statement to you in this letter is incorrect?

MR. SMITH: The way it stands now, it is your statement taken from an instrument that hasn't been identified except there was a similar letter in '43.

MR. TAYLOR: He has admitted receiving the letter.

A. No, I'm not sure. That's thirteen years ago. I couldn't be sure (446) that that was a letter or a copy of a letter.

Q. Are you sure of the general contents that you wrote for this information so you could make application to pass the Michigan State Bar? Let's get down to brass tacks.

A. I am trying to get to the —

Q. Isn't that about the time you were making application or preparing your application so you could possibly seek admittance to the Michigan State Bar?

A. It could have been. * * *

(447)

Q. When did you leave Louisville, Kentucky?

A. I believe it was 1941 or '42. 1941 I believe. The latter part of 1941, if I am not mistaken.

Q. Did you practice law in Louisville up until the time that you came to Michigan?

A. Yes, sir.

Q. You came to Michigan during the War didn't you?

A. Yes, sir.

Q. When you came to Michigan, you went to work for a tool company or something did you not?

A. Yes, sir.

Q. In Fenton?

A. Yes, sir.

Q. You temporarily gave up your practice of law at that time didn't you?

A. The active practice, yes, sir. I maintained my membership of course in the Kentucky Bar and left my office in the hands of an associate down there.

Q. How old were you at that time?

A. I will have to count back Mr. Taylor.

Q. We can make deductions as far as that is concerned.

A. I will try to make deductions for you. I am fifty-four years old now. This is '56. You have me so I can't add.

Q. That's wonderful.

A. I'm fifty-four now Mr. Taylor. I came here in '41 or '42.

Q. You were — you had just passed your thirty-eighth birthday. You were thirty-nine when you came here to Michigan, when you came here?

A. Around that age, yes, sir. • • •

(448)

Q. At that time were you married or single?

A. I was married.

Q. What was the name of your wife at that time?

A. Leah.

Q. When and where did you marry Leah?

A. I married her in Kentucky before we came up here.

Q. Were there any children born of that marriage Mr. Dye?

A. No, sir.

Q. Did you adopt any children?

A. No, sir.

Q. Permit me to refresh your memory here with regards the second paragraph.

MR. SMITH: I don't know if that is about children or adopted children. If it is it would be inadmissible. He has asked the question and gotten his answer and he couldn't impeach on it. It's merely collateral.

THE COURT: It seems to me the issue is collateral to the matter before this Court.

MR. TAYLOR: What did you say?

MR. SMITH: It would be purely collateral. You couldn't impeach on it anyway.

MR. TAYLOR: I don't understand it. You mean any answer he gives me, whether it's true or otherwise, I am bound by it?

MR. SMITH: Outside of asking if he ever was convicted of any crime. You can prove if he has, if you can establish that.

MR. TAYLOR: That's a good idea.

MR. SMITH: Let's go into that.

Q. By the way, have you ever been arrested and convicted?

A. No, sir.

Q. Of any crime?

(449)

A. No, sir.

Q. Where did the first marriage take place Mr. Dye?

MR. SMITH: Just a minute. If the court please, counsel is attempting to make reference to things in hopes that some of these jurors are going to go off on a side-track and decide this case on something that is purely collateral. We have a perfectly good lawsuit involving the shooting of Mr. Clark. Any testimony that is so remote in time or so disconnected as having no bearing whatsoever whether the person answered yes or no on the results of this trial, any relationship whatsoever to shall we say disposition that would be shooting somebody, if it lacks that quality then it shouldn't be admitted into this case. It could only be used, it could only be wanted, we'll put it that way, for the purpose of trying to get this Jury to disregard the issues in the case and say the man was married before or something else and therefore I don't like him.

MR. TAYLOR: I don't see what is wrong with marriage, if the Court please.

THE COURT: There is nothing wrong with marriage and I think that is the point Mr. Smith takes. The Cross Examination should be limited to those things which have a legitimate relation to the issues.

MR. TAYLOR: They are not connected up. They may be stricken.

THE COURT: May I finish please? If they affect the credibility of the witness, it is proper under Cross Examination, but if they neither (450) affect the credibility or have any legitimate relationship to the issues but are of a nature that might prejudice or be misapplied by the Jury, it is not proper. You have — you will have to make the decision counsel before you ask the question. It would be the opinion of the Court offhand that the place of marriage, of the first marriage has no legitimate relationship to the issue here and would in no way be related to the credibility of the witness.

Q. All right. Getting back to Viola Dye. Let's start with Viola Dye. Who is Viola Dye?

A. She is an older sister of mine.

Q. How old is she, Mr. Dye?

A. Oh, in her sixties. I couldn't tell you exactly. There was only ten of us.

Q. There were only ten of them. Why is it in each instance you put this property in Viola Dye's name?

A. What property?

Q. All the property that you ever owned.

A. Mr. Taylor, that is a mis-statement of the fact.

Q. Do you have any property in your own name now?

A. I don't own any real estate, no, sir.

Q. Then the property that you induced Bill Clark to go in on this farm at that time, you told him that if he would come in you would buy the farm next door?

A. Oh, no. No, sir.

Q. You deny that?

A. I deny I induced him to come on the farm and I deny that I told him any such thing as that and he knows that.

Q. In whose name did you buy the farm?

A. My sister bought the farm, Mr. Taylor.

(451)

Q. She came up here or did you buy it as her agent?

A. I bought it for her under her instructions.

Q. You knew that in buying the farm that you are putting Clark on, and as far as the lease is concerned that if he had any action for damages, he'd have to go down to Louisville to serve her?

A. For what damages?

Q. For any action for damages.

A. I know I didn't think of anything like that. I hoped the boy would straighten out. • • •

Q. In fact, in having this property in which you were dealing in the name of Viola Dye, how many farms were there?

A. There were three farms.

Q. All in the name of Viola Dye?

A. That's right.

Q. And these checks came through in the name of Viola Dye and William Clark, is that right, from the milk checks?

A. Some of them did. At the beginning I don't know how Bill put them in. I'm not sure, Mr. Taylor, as to all of them.

Q. Do you remember going over with one of those checks and asking Mrs. Clark here to forge your sister's name to that check so you could cash it?

A. No, I do not.

Q. That's not true?

A. Oh, no.

Q. Of course having this property in your sister's name, any profit that was made on the farm by your supervision, you wouldn't have to account for it would you as far as income taxes are concerned? It's quite an advantage is it not?

A. What, Mr. Taylor?

Q. The reason why you had this property in Viola Dye —

(452)

A. It's a disadvantage not to own any property. I wish I did own some, yes, sir.

Q. Isn't it a fact that right now in your possession you have got deeds, unrecorded deeds to this property so that if your sister should pass away you would be the owner of those farms?

A. Of course not, Mr. Taylor, no, sir. * * *

(461)

* * * Q. Are you married at the present time?

A. No, sir.

Q. Live alone?

A. Yes, sir.

(466)

Q. Is it customary for you as an attorney to prepare a thirty-seven hundred-dollar note in lead pencil?

A. In dealing with that type of individual, I prepared it where and when I can get it signed. I would have written it up with a whitewash brush if I could have gotten him to sign it.

Q. "For value received, I promise to pay to Clifford B. Dye, Attorney, three thousand seven hundred ninety-six

dollars, payable to him at or to his order in thirty days from date with six per cent interest from date" and this is March 10, '54.

A. That's right.

Q. How did you expect him to pay it?

A. Well, as I said, Mr. Taylor —

Q. Just one thing — not what you said.

A. With money.

Q. How was he going to get that much money in thirty days?

A. Well, as I tried to tell you just then, Mr. Taylor. Mr. Clark told me that his wife's cousins had plenty of money and they'd back her in anything. She also made that statement to me about this same note at a later date.

Q. Now, you made a statement that this note had never been paid, didn't you?

A. Well, it never was paid. Whether I made the statement or not, I will make it now.

Q. It never was paid?

A. No, sir. It was cancelled out by us, but it wasn't actually paid.

Q. Well, maybe, I should be a Philadelphia lawyer because I don't know the difference between a cancelled note or paid note.

A. A paid note is paid, a cancelled note is not.

Q. Where you forget about it?

A. It's cancelled out in final determinations of matters between my sister and —

Q. You got money for it?

A. No, sir.

Q. You got value for it?

A. No, sir, I got nothing like value for it.

(467)

Q. Didn't you buy twenty-thousand dollars worth of cattle at an appraised value where it was only appraised for fourteen thousand dollars and the settlement was based on that amount?

A. No, sir.

Q. You deny it?

A. Yes, sir.

Q. Mr. Dye, can you explain to the Court and Jury why it was that when you were asked to produce this in another Court case you could not locate it?

A. Why, I was never asked to produce this, Mr. Taylor.

Q. You heard Mr. Clark on the stand testify that you were asked to produce this at another hearing and you refused to do it?

A. No. * * *

(468)

* * * Q. They told you five hundred dollars?

A. Yes, sir.

Q. Everything they say is of course different when you testify to it.

A. Most of what they said is very different.

MR. SMITH: Counsel is inviting trouble with this witness by using sarcasm. I think we'd get along much faster if he'd ask questions in a different manner.

THE COURT: I see nothing to criticize, Mr. Smith. You (469) may proceed. * * *

* * * Q. Then you were told they made a five hundred dollars deposit on a ten thousand dollar farm?

A. Yes, sir.

MR. SMITH: May I make an objection on the record. It would seem to me that this is a collateral matter and I claim once answered it ought to be terminated as far as pursuing the collateral matter. I take it that the subject matter is whether or not Dye induced Clark to come onto the farm in the first place or whether they got together at a (470) picnic and both decided. It wouldn't make any difference in this case. We have spent a considerable period of time on it. I don't think it is a proper subject matter to be pursued and Cross-Examined on.

MR. TAYLOR: If the Court please, let me answer counsel in that respect. If this witness has informed his lawyer falsely and we can show that he had definite knowledge that the Clarks did have some place to go, it goes to the credibility of Mr. Dye and it is certainly admissible. * * *

THE COURT: We haven't reached the point of argument in this matter. You have asked this question about the amount that was deposited on this contract. It isn't of

great importance to the issue. It has been explored rather thoroughly and I would suggest to continue questions of this type would be somewhat repetitious so supposing we confine ourselves to the answer of this last question and (471) perhaps get on to a new subject.

Q. Do you want to answer the last question?

(Question read by reporter: "Then you were told they made a five hundred dollars deposit on a ten thousand dollar farm?").

Q. Did you know?

A. No, I didn't know.

Q. You are talking now that you didn't know actually whether they made it but you admit they told you?

A. Yes, sir, they told me they made a five-hundred dollar payment.

MR. TAYLOR: If the Court please, I at this time wish to offer in evidence People's proposed Exhibits 28, 29, and 30 for what they are worth.

MR. SMITH: What are they?

THE COURT: Twenty-eight is a note, twenty-nine is a chattel mortgage, thirty is a note, all signed by Mr. Clark.

MR. SMITH: If the Court please, I doubt — what is the date on them?

MR. TAYLOR: These are all in '53 — October 4, 24, June 8 — we have others if there is any objection to them.

MR. SMITH: I object on the ground it is strictly immaterial to any issue in this case.

THE COURT: There has been a great deal of testimony taken in regard to them without objection. I see no particular purpose served at this moment by adding them and let's hold them. They have been referred to constantly in the testimony without objection.

Q. Thank you, Your Honor. I am showing you now People's proposed Exhibit 27 and ask you whether or not your signature appears, I will ask you whether or not your signature appears thereon.

A. Yes, sir.

(472)

Q. And for identification purposes is that an application for a concealed weapons license made in this County?

A. Yes, sir.

MR. SMITH: May I see it please when you are through?

MR. TAYLOR: Now, if the Court please, at this time we will ask that this be admitted in evidence, the application and the license is attached thereto. He has identified it as his signature.

THE COURT: Any objection?

MR. SMITH: No. I would like to ask one question. It appears there is a sort of erasure on the front of that. Mr. Clark's address seems to have been erased.

A. I can explain that. Chief Orie Clark of the Fenton State Police, signed the permit. That's the gentleman who testified here. He gave us the wrong address. We had to rub it out and change the address. That was the gentleman who was asked —

Q. You said the Chief of the State Police?

A. Chief of the Fenton Police, Chief Orie Clark who testified here.

MR. SMITH: No objection.

THE COURT: Received.

Q. I call your attention specifically to this application and ask you whether or not it isn't a fact that if this application has been completely filled in and these questions all answered, such as "Have you ever been convicted of a felony or adjudged insane," that you did not answer that question and at the time that you filled that in that you intentionally did not answer that question?

A. Oh, no, sir.

Q. What was your reason for not answering it?

A. What do you mean? Show me what you are talking about Mr. Taylor. Just point it out to me.

Q. "Have you been convicted of a felony or adjudged insane" — blank.

A. Apparently I didn't put anything there.

(473)

Q. Was that intentional?

A. Oh, no, sir.

Q. Oversight?

A. It must have been. It isn't answered one way or another. I think there are other questions there that aren't answered aren't there?

Q. You say now under oath that this was strictly an oversight?

A. Yes, sir.

Q. Permit me to merely refresh your memory. Would that in any way change your answer?

A. Absolutely not.

MR. SMITH: I'd like the record to show at this time that counsel is, by innuendo, again trying to infer either that this witness has been convicted of a felony or adjudged insane. I am going to do something. I am going to move for a mistrial just for the sake of the record because I am so apprehensive that we are going to put up with this thing from now on.

THE COURT: Your motion is denied but I should instruct the Jury they should pay no attention to any innuendo that may have been suggested by Mr. Taylor's question until such time as testimony is properly admitted on those matters. So you will disregard any suggestion you may gave gleaned from Mr. Taylor's questions.

MR. TAYLOR: Thank you, Your Honor.

Q. Your experience with guns, Mr. Dye, and the use of guns is not new to you is it?

A. That's hardly a fair question. I have seen guns all my life.

Q. Have you on other occasions used guns as threats against individuals?

A. No, sir.

(474)

Q. Did you have a lake on your property?

A. There is a lake on the place where I live, a small lake.

Q. The Shiawassee River runs through that lake does it not?

A. The Shiawassee Creek runs through it. It's hardly a river.

Q. Isn't that a tributary of the Shiawassee River, sir?

A. Yes, sir.

Q. You have been informed before by the Conservation Department where the lake has an ingress and egress, it is part of the water-ways, you have been informed of that?

A. No, sir, not to that effect.

MR. SMITH: I object to that as being purely argumentative. It's not true as a matter of fact. It's not material to any issue in this case. If you want to stick to whether he used a gun to put somebody off, I haven't any objection.

THE COURT: I take it the counsel is laying the groundwork for attacking the credibility of the witness.

MR. TAYLOR: That's right, Your Honor.

THE COURT: The witness testified before you objected that he had heard that so I think the question may stand — the answer may stand rather.

MR. SMITH: If the Court please, I'm not taking any exception to the Court's ruling. All I am trying to say is that apparently counsel now has asked this witness didn't the Conservation Department tell you that lake is public property.

THE COURT: The river.

MR. SMITH: He previously intimated that he was interested in some gun play or something down there. Now we leave it right up in the air. He (475) doesn't ask him whether he pulled a gun on anybody.

MR. TAYLOR: That's my next question.

MR. SMITH: Let's get at it then.

Q. Do you know a Don Hansard, Mr. Dye?

A. I don't recall him, no, sir.

Q. Well, do you recall here within the last year or two of a man being on your lake on your property and of going down there and saying "Get off my lake" and he said to you "I have talked with the Conservation Department. I have a right to be here", and you said "You'd better get off because I'm going to do some target practicing right away" and that bullets started to go all around him in the lake and he got off?

A. That isn't true. Of course not.

Q. That's not true?

A. No, sir.

Q. That is not true?

A. No, sir.

Q. Well, do you know a man that owns a lumber yard in — do you know two boys, Carl Elliott and Allen Cur-

tain who was upon your lake and you came at them with a shotgun and said you didn't want them fishing on that lake?

A. I don't recall the incident: I know a boy named Curtain.

Q. Can you say that you did or didn't.

A. I didn't come at anybody with a shotgun, no, sir.

Q. You never went down there with a shotgun in your hand on either one of these occasions?

A. I wish you'd be a little more specific with your questions and I'll try to give you a more specific answer please.

Q. All right. Did you at any time threaten anybody on your lake with a shotgun or a rifle or some other gun?

A. Of course not. Never in my life.

Q. If this Don Hansard stated that you told him that you were going to do some target practicing if he didn't get out of there, (476) regardless of what the Conservation Department said, that would be untrue?

A. That's right.

Q. Now, I'll be specific again. Carl Elliott worked for a lumber yard for a man by the name of Lee Curtain in Holly. Do you know him?

A. I know Lee Curtain, yes, sir.

Q. I said Carl Elliott. Do you know him?

A. Well, I don't just place the name, no, sir. I might know Carl Elliott if I'd see him. I don't know.

Q. Did you at any time see two boys on your lake?

A. Many times.

Q. Did you at any time, Mr. Dye, see two boys on your lake and that you came down there with a shotgun and said that you didn't want them fishing on that lake?

A. I told lots of people I didn't want them fishing on the lake.

Q. I didn't ask you that. You told me to be specific and yet you go all around the bush. You can answer yes or no.

A. I have on more than one occasion been to my Lake with a shotgun in my car or in my hand.

Q. Are you afraid to answer the question?

A. I thought I am answering it.

Q. Did you or did you not? I want to be very specific. Did you or did you not at any time, with a shotgun, order one Carl Elliott off your lake?

A. I have no recollection whatever.

Q. Did you at any time order Allen Curtain off your lake at which time you had a shotgun?

A. I have no recollection of the incident whatever.

Q. Then that could have happened?

A. No, sir. Not in the way you put it, Mr. Taylor. I have never threatened anyone with a shotgun.

(477)

Q. Do you want me to put it in writing Mr. Dye?

A. That might be helpful.

Q. The way you did the note you mean?

A. If you'd like Mr. Taylor. You are in charge here of this.

Q. Sometimes I wonder. Are there any other occasions that you know of or are there any occasions in which you know, that you know you went down to that lake with a shotgun and ordered people off?

A. Yes, sir. I went down with a shotgun and even pursued people who were stealing, breaking the cabin, stealing my boat. I have gone down there several times with a shotgun in my car. Yes, sir.

Q. The fact is that on most of the occasions when you want your way you take a gun with you, don't you Mr. Dye?

A. No, Mr. Taylor. The law is the proper way to settle things.

Q. That's a good question. On May 7th when you had this assault, alleged assault when Mr. Clark brutally beat you, bruised you and so forth, the only things I noticed, in your declaration for ten thousand dollars, that you left out the words abrasions, lacerations and contusions, on that day you went directly to the Police Department to complain didn't you?

A. No, sir. I went to my doctor. . . .

(478)

• • • Q. That's it. Technically speaking is a very good terminology but when you claim that this assault on this particular night was made you didn't tell anybody did you? On August 26th from that stand you have testified today that this man here made a murderous assault upon your person and you never or wouldn't make any complaint to the Police until today?

A. I told you.

Q. You never told me anything.

A. I sure did Mr. Taylor. I told you that this man, I had been a victim of a series of vicious assaults at the hands of this man and that this occurred in my yard and he attempted, he said he was going to kill me. I believed him to be trying to kill me and he gave every indication that he was determined to kill me.

MR. TAYLOR: If the Court please, at this time I offer in evidence the statement made to me by this man on the night in question when he claims to have informed me of what took place on that night.

MR. SMITH: If the Court please, I don't know that the witness says it in that statement that Mr. Taylor has. He is telling you what he told you however.

A. That's right. That's what I told you Mr. Taylor. I told you other things, Mr. Taylor, before today.

MR. TAYLOR: If you have I must have been deaf because I never knew what happened until today. • • •

PROCEEDINGS HAD FEBRUARY 24, 1956

CROSS EXAMINATION (Continued)
Conducted by Mr. Taylor:

(480)

• • • Q. When did you cease being a Judge down there Mr. Dye?

A. Why my last day in office as Magistrate was the last day of the year of 1937.

Q. Is that when the term ran out at that time?

A. Yes, sir.
Q. Did you run again for re-election?
A. Yes, I did. • • •

(482)

• • • Q. You went to work for some machine shop or tool company or something in the capacity as sort of a public relations man or in capacity?

A. Well, some of my work would have been that, yes, sir. Sort of special assignments, assisting the second in command there of the place.

Q. You went in to work there on a salary?

A. Yes, sir.

Q. And that they had war contracts did they not Mr. Dye?

A. Yes, sir.

Q. Now you did not go there or take up this position with this particular company in any way so it would alleviate you from any draft call did you?

A. I tried to enlist in the Service at one time. • • •

(483)

Q. Now, your wife at that time, she was a Michigan girl wasn't she?

A. She had been reared in Michigan but she had lived in Kentucky thereafter.

Q. Well, at the time that you filed for the Bar were you and your wife then, were you not living in a home which had been her childhood home here in Michigan?

A. She lived at the place for about two years during the first World War, yes, sir.

Q. It had been her childhood home had it not?

A. She told me that she had lived there for a year and a half or two years during the first World War when she was a little girl.

Q. And when you wrote to the Bar and made application at that time didn't you state to the Bar at that time when you were seeking admission to the Michigan Bar that you and your wife were comfortably located in Michigan

and in a home which had been your wife's childhood home and that the children were going to school at that time?

A. Well, I don't remember if I wrote that. Those are the true facts and they are more or less substantially the true facts.

Q. When I asked you whether or not you had any children, which children are you referring to at this time?

A. My wife's children.

Q. Not yours?

A. Oh, no.

Q. Children by a prior marriage?

A. Yes, they were her children, a boy and a little girl.

Q. I will show you this little picture. Isn't that the little girl?

(484)

A. That looks like her.

Q. Marelyn. There is also a boy too?

A. Yes, sir.

Q. How long, for what period of time, Mr. Dye, were you the stepfather?

A. I couldn't tell you for sure.

Q. Do you recall when this marriage took place?

A. Yes, sir.

Q. When was that, Mr. Dye?

A. It took place in just shortly before we came up here. That would have been in '41.

Q. Now, when you bought this home which you have indicated was at one time your wife's prior childhood home, did you buy that in the names of both you and your wife?

A. No, sir.

Q. In whose name did you buy that?

A. That was bought in my name.

Q. Did you later file a petition in Court asking that that property be declared your property entirely as your own?

A. I don't recall whether I did or not.

MR. SMITH: For the sake of the record, I submit that that would be immaterial, purely a collateral matter, not one of those things that would be covered by record proof if there is such a petition.

THE COURT: I think the People are entitled to elicit facts which might aid the Jury in the credence to be given to the respondent's testimony. I believe he already testified (485) he has no property in his own name.

MR. SMITH: That isn't the question, no.

THE COURT: I realize that but this is tending toward that point.

MR. SMITH: I take it it's Cross Examination to test the credibility of his statement that he had no property and has no real estate. If counsel, we covered it once, but if counsel wants to ask him again if he did buy it in his own name and if later it was conveyed to his sister by deed and I think this is in the evidence signed by himself and his wife, I wouldn't have any objection to that.

THE COURT: The Court is not in a position to anticipate what Mr. Taylor has in mind.

MR. TAYLOR: Thank you, Your Honor.

MR. SMITH: My objection is however that it is irrelevant to any issue in this cause.

THE COURT: Mr. Taylor may proceed for the moment.

MR. TAYLOR: Thank you, Your Honor.

Q. Maybe if I refresh your memory it would be less embarrassing. That is your signature Mr. Dye?

A. Yes.

Q. Did you draw that Bill of Complaint?

A. I don't know whether I drew it or not.

Q. You signed it?

A. Yes, sir.

Q. Let me refresh your memory. Mr. Clement E. Miner drew the complaint. As to paragraph four on the final determination of this suit, "This plaintiff may be decreed to be the sole and only owner of all the property now owned by him or by the parties to this suit."

A. That is there, yes, sir. I see it.

(486)

Q. So even though this property had been purchased, you wanted it all. You are asking the Court to give it all to you?

A. My wife knew it was my sister's.

Q. Let's see if we can be gentlemen today.

A. I assure you I want to be, Mr. Taylor.

THE COURT: That statement, Mr. Taylor, may be stricken. Mr. Dye has been a gentleman.

MR. TAYLOR: I'm referring to myself.

Q. Most of these questions I put to you, Mr. Dye, let's see if we can answer yes or no and speed it up if we can. That did refresh your memory in that respect?

A. It didn't refresh my memory, no, sir. I see Mr. Miner had that clause in that paper and I signed it, yes, sir.

Q. That was your petition wasn't it?

A. I think it was. I didn't see the first part of it.

MR. SMITH: It was a Bill of Complaint as distinguished from a petition.

A. I just saw the end of it. I could tell you what it is if I saw the first part.

Q. I'll be glad to offer this whole file if you want it.

MR. SMITH: No, just let him see what it is. You called it a petition.

A. That appears to be a Bill of Complaint for a divorce. Does that answer you?

Q. Mr. Dye.

A. Yes, sir.

Q. You, as a lawyer, are telling this Jury that this appears to be a Bill of Complaint.

A. It is a bill of Complaint. It says so at the beginning.

Q. So it doesn't just appear. It is.

A. Well, yes, sir.

Q. Now, did you buy some property down in Florida?

A. No, sir.

Q. At any time?

A. No, sir, never.

Q. Did you ever have a discussion with anyone as to why your name should be on it alone or why it should be put in your sister Viola's name?

A. No, sir.

Q. Did you buy some property in Florida for your sister?

A. Mr. Taylor —

Q. You can say yes or no.

A. My sister bought, yes, sir.

Q. You bought it for her did you not?

A. I guided her in the thing and represented her in it, yes, sir.

Q. And your wife was with you at the time and helped you select that property did she not?

A. Oh, no, she didn't help me select it.

Q. Wasn't she with you at that time?

A. Oh, yes.

Q. Wasn't there some discussion as to why you were buying it and putting it in your sister's name?

A. Oh, no.

Q. None that you recall?

A. There would be no occasion for any. Viola was buying it.

Q. Do you know whether or not it was brought to your attention and set up in another Court case?

A. I have no recollection.

Q. Do you want me to refresh your memory or do you recall?

A. I'd be glad for you to.

MR. SMITH: For the sake of the record, I'd like to again impose the objection that it is improper for counsel to Cross-Examine on purely collateral irrelevant matters after obtaining the answer of the witness, trying to present proof that might make it look as (488) though he, shall we say he were not telling the truth on the particular subject.

THE COURT: The witness may answer the question.

MR. SMITH: I'd like to impose the further proposition that if counsel is referring to, shall we say, a pleading in a lawsuit in which somebody alleged yes I was with him and he bought it in his sister's name. That wouldn't be any admission. It would have no tendency to establish a fact. If he can show any pleading where Mr. Dye

said "Yes, I bought it but I had it put in my sister's name", that would show that he was not telling the truth.

THE COURT: I think the previous question was asked which would lay the basis for all of this. Read the last four questions back.

(Questions read by reporter).

THE COURT: Very well. The questions have been answered.

Q. If you will just read this portion here.

MR. SMITH: Counsel is handing the witness a paper.

MR. TAYLOR: Purely to refresh his memory.

MR. SMITH: I'm entitled to know whose paper it is and what kind of a paper it is.

THE COURT: Before he answers it, you may see it.

MR. SMITH: May I see it?

MR. TAYLOR: Yes.

MR. SMITH: If the Court please, this is not a paper prepared or signed by this witness and I object to it as being self-serving — couldn't possibly discredit this witness.

(489)

THE COURT: The instrument has not been offered and no question has been asked, so will you proceed, Mr. Taylor, and then perhaps we will have a question that can be objected to.

MR. TAYLOR: I will be glad to have you read this paragraph and see if that does or does not refresh your recollection.

MR. SMITH: Of what Mr. Taylor?

MR. TAYLOR: Of bringing to his notice that it was brought to his notice that the property was purchased in Florida and why it was not put in his wife's name but the reason it was put in his sister's name.

MR. SMITH: I think you are referring to something that has been filed just very recently, since the alleged offense as a matter of fact.

THE COURT: The Court has no knowledge of this instrument and no questions has been asked the witness. He is apparently refreshing his memory. Shall we wait until the question is asked?

Q. Just a moment. I have shown you. Now does this refresh your recollection, Mr. Dye?.

A. I remember that paper, yes, sir.

Q. Does this refresh your recollection as to some one having brought to your notice the fact that property was purchased in Florida. It was not put in your wife's name but was put in your sister's name. Does this refresh your recollection?

A. It doesn't change a thing I have said. Will you repeat your question again?

(Question read by reporter).

MR. SMITH: If the Court please, I seriously (490) and strenuously want to object to even that question being asked because what difference would it make if somebody said I own the Court House or didn't own the Court House.

THE COURT: The intent of the question is proper. Perhaps you have not phrased the question as you might have done. I think your previous question related to a possible controversy over whether Mr. Dye had property in his own name or not. I suggest that this question be withdrawn and you attempt to rephrase it and then we'll rule on the question.

Q. Were you not served, was there not served upon you —

MR. SMITH: Just a minute. So far counsel is trying to inject in this case a purely collateral matter which would be not only immaterial, it is contrary to the rules of Cross Examination and it can accomplish nothing except to confuse the issue or perhaps prejudice the jury. If there were any issue involved here, let's say if its whether or not he bought property in his sister's name in Florida that he had some interest in himself which he denies; if there were any papers that would show that, I wouldn't object to it because that would discredit him but to have counsel try to put in the claim of some attorney, perhaps here in Pontiac who has an interest in this affair, draw a pleading and then say to Mr. Dye, didn't such and such a person in some pleading insist that you bought in nineteen whatever it was, a farm (491) in Florida or a piece of property in Florida in your sister's name when it should have been

yours — it doesn't discredit, it doesn't prove anything. It isn't an admission on this witness' part. It can't discredit him, whether or not somebody said something. That would be just as open as it would be to have someone out in this hall say it and it's purely inadmissible.

THE COURT: Mr. Smith, on more than one occasion in this trial, Mr. Dye has testified without objection that he has no property. Conceded that perhaps that matter is of no materiality, the fact he said that is on the record and unobjected to. I take it that the questions Mr. Taylor is now submitting tend to in his judgment lead the Jury in determining the credence that may be given to Mr. Dye's testimony and to the extent that he has already testified without objection to his financial status, I think that matter may be explored beyond reason of course or by way of repetition. It is a collateral issue to a great degree but I think the question is proper, and proper questions at this time with reference to this matter and his refreshing the witness' memory are acceptance to the Court.

MR. SMITH: May I just say this. The general subject to be found in 405 of Gillespie, the first edition, the point is this: It is a purely collateral matter. The witness is bound —

THE COURT: The first position is not changed. I think (492) at the moment we do not have a question before us. The Court has already indicated this is to a degree a collateral matter which has already been explored. Let your question run only to the credence of the witness' testimony.

MR. TAYLOR: It's the contention of the People that this matter is not collateral. This goes to the intent. This goes to the intent of Mr. Dye. This intent has been shown —

THE COURT: Perhaps if we are going to have an extended legal discussion, we ought to excuse the Jury.

MR. TAYLOR: Could I refer the Court to 28.1050 which reads as follows: "In any criminal case where the defendant's motive, intent, the absence of, mistake, or accident on his part of the defendant's scheme, plan or system in doing an act is material; and like acts or other acts of the defendant which may tend to show his motive, intent,

the absence of, mistake, or accident on his part of the defendant's scheme, plan or system in doing the act in question may be proved whether they are contemporaneously with or prior or subsequent thereto, notwithstanding that such proof may tend to show other acts." Now —

THE COURT: Gentlemen, apparently both counsel lay some street on this point. If we are going to have a rather extended legal discussion which may involve matters that would go to the merits of this cause, I think it (493) would be well to have the Jury excused.

MR. TAYLOR: May I say this; at this time I will withdraw my question.

Q. The fact is, Mr. Dye, that you never bought a nickel's worth of property in your own name that you didn't transfer to your sister Viola Dye. Yes or no?

A. No, that isn't true.

Q. Is it ninety per cent true?

MR. SMITH: A. I object to that as argumentative.

MR. TAYLOR: He can tell me the percentage. Did he ever have a piece of property in his own name?

MR. SMITH: There isn't anything in my language as being ninety per cent true. It's either true or not true.

THE COURT: I think your question is improper. You can rephrase it.

Q. Would you say, Mr. Dye, that practically in every instance wherever you bought property since you have been in the State of Michigan has been purchased in the name of Viola Dye? You can answer yes or no.

A. I believe I'd like to —

Q. You can answer yes or no.

A. I can't answer it yes or no but I can say this.

MR. SMITH: Answer it yes or no.

Q. Isn't it a fact that on practically every occasion —

MR. SMITH: That wasn't the question.

THE COURT: Let's keep this matter on an even basis. (Last question read by reporter).

THE COURT: Witness, I suggest that you do.

A. I answer it no with the request that I be permitted to explain my answer.

MR. TAYLOR: Your explanation that you want to give, Mr. Dye would in some way mitigate your no answer, (494) is that right, so that you would not be committing perjury on the stand?

A. No. It would accomplish the just proposition of giving me an opportunity to answer the truth rather than a yes or no answer which is not the entire explanation of it.

Q. All right, Mr. Dye, we'll get away from that question, if you don't want to answer it, O. K.

A. I haven't any objections of answering any legitimate question, Mr. Taylor.

Q. Do you want to take over Mr. Dye?

THE COURT: Will you proceed Mr. Taylor?

Q. You heard these two farmer boys testify on the stand as your witnesses that they heard Mr. Clark at the dance say that after they got you behind bars that he was then going to sue you. You heard them say that didn't you?

A. Yes, sir.

Q. Isn't it a fact, Mr. Dye, that it would be absolutely impossible for Mr. Clark to ever sue you and get a nickel out of you under any circumstances, out of any particular action of any Court because you haven't anything that could be attached?

MR. SMITH: If the Court please, I object to the question as being strictly irrelevant and I ask that it be stricken because it is prejudicial and I particularly ask that the Jury be instructed to disregard the question.

MR. TAYLOR: Prejudicial in what respect?

MR. SMITH: What difference does it make in a suit involving a shooting whether a man is worth five hundred, five thousand, or five million?

MR. TAYLOR: Mr. Smith was the man that put his foot in the door and asked Mr. Clark if it wasn't a fact he was going to sue Dye and now he objects to getting the answer.

(495)

MR. SMITH: It was for another purpose entirely and it is legitimate.

MR. TAYLOR: If it's for another purpose that Mr. Smith wants the same answer, we have certainly a right to

bring out on Cross Examination the reason that these men came into this Court to tell this Jury that Mr. Clark, the man that was shot was going to sue him and have him put in jail and we have a right to show —

THE COURT: Mr. Taylor, your question asked if this man is financially solvent or not and that question is not material to this cause and I would suggest to the Jury that it is unimportant in your decision whether Mr. Dye is financially solvent or not and I will rule because that is the basic purpose of asking the question, that it is improper.

Q. Do you own any property in the State of Michigan at this time, Mr. Dye, in your own name?

MR. SMITH: I object to it for the same reason.

THE COURT: Witness may answer that question.

A. No, sir, I don't own any property at all.

Q. If a judgment was procured there would be no real property?

MR. SMITH: Wait a minute.

MR. TAYLOR: Wait until I finish. If there was a judgment procured against you by Mr. Clark, there would be no property which could be attached belonging to you.

MR. SMITH: If the Court please, I will not only object to that —

THE COURT: The Court has ruled on that.

(496)

MR. SMITH: I will have to ask you again, that the Jury again be instructed to disregard it.

THE COURT: I am sure they will. I already told them the questions of Mr. Dye's financial solvency is not material to this cause and the Jury will disregard any suggestion or imputation that might be gathered from Mr. Taylor's questions.

MR. SMITH: May I ask the Court to do that, to instruct Mr. Taylor once the Court has ruled on an issue, not to repeat again?

THE COURT: The Court doesn't feel that one violation is sufficient for criticism.

MR. SMITH: I am not making a motion for mistrial now. I did that once.

Q. These two witnesses, the Farner brothers, that you procured as witnesses, you represented the parents of these boys did you not, Mr. Dye?

A. Represented Mr. Farner.

Q. Couldn't you say yes or no?

A. Yes, sir. You said the parents. It was one parent. I am trying to answer right, see?

Q. In that case you started bankruptcy proceedings wiping out all the debtors of the parent of the Farner boys in that action did you not?

MR. SMITH: I object to that question as so immaterial and irrelevant.

THE COURT: The question is improper and not a proper subject for Cross Examination.

MR. TAYLOR: Merely trying to show the interest and bias of the witnesses who appear for the defendant.

MR. SMITH: It's so far fetched. There were two boys here as witnesses that were friends of Mr. Clark and let's assume their father once went in bankruptcy, what difference would that make?

(497)

Q. Now, Mr. Dye, the house in which you are now living is in the name of Viola Dye is that not true?

A. That is true.

Q. You have no interest in that house whatsoever?

A. I have no title to the house. I live there. * * *

Q. * * * Do you recall having a fire, a grass fire on your property by the railroad tracks?

(498)

A. Not lately.

Q. Oh, Mr. Dye. Why don't you? I didn't say lately. Last year. Ten years ago. I'm asking isn't it a fact that you had a grass fire on your property. You can answer that yes or no. * * *

A. I recall seeing several grass fires.

Q. Do you recall the fire equipment from the City or Village of Holly coming to your place where you now reside?

A. Yes, sir.

Q. Do you recall that the man that drove that fire truck, do you know him as Bill Woods?

A. No, sir. I might help you, Mr. Taylor.

Q. I don't want any help. After they went back and worked on your grass fire, you got into an argument with this driver and called him an s. of a b. and all the initials.

A. No. There was no Holly Fire Department ever came to put a grass fire out where I live to my knowledge and I never called the man, (499) any man connected with the Fire Department such a name as you said.

Q. Didn't you take the keys out of a jeep and block the passageway of this equipment so it could not get off your farm?

A. Which equipment, Mr. Taylor?

Q. The equipment that was used for putting out the fire?

A. I took no keys out of anybody's equipment.

Q. It was a pick-up.

A. And the Holly Fire Department has never to my knowledge attended a grass fire on the place where I live. They came through my place one time. I suppose they came through my place. • • •

Q. You deny now that the Holly Fire Department came to your place to put out any grass fires and that you had any discussion with them and you ever took the keys out of the jeep, that is your answer, no?

A. You asked me several questions. I did not take any keys out of any vehicle, jeep or otherwise. I have never seen the Holly Fire Department attend any grass fire on my place to my knowledge.

Q. Thank you very much, Mr. Dye. Not to your memory so that is all right. Do you know as a matter of fact that the milk check when Mr. and Mrs. Clark first went upon your farm was around fifty dollars and when this controversy arose, it was in the neighborhood of twelve hundred dollars per month? You can answer that yes or no.

A. I do not know that. There was no milk check when they came (500) to the place until my sister bought the cattle and so forth.

Q. What was the first milk check, Mr. Dye?

MR. SMITH: I object to that as strictly irrelevant and no bearing on this case.

THE COURT: The matter has been explored rather thoroughly.

MR. SMITH: It was explored rather thoroughly when Mr. and Mrs. Clark took the stand. It's not Cross Examination of anything that I asked Mr. Dye.

MR. TAYLOR: If the Court please, that is the meat of this case.

MR. SMITH: The meat of this case is shooting somebody.

MR. TAYLOR: Sure, and the motive and reason for it.

THE COURT: Before we get into any more discussion, let the witness answer.

A. There was no milk check when Mr. Clark came to the place.

Q. What was the amount of the first milk check, Mr. Dye?

A. I haven't the least idea. It would have been very, very small I imagine.

Q. Do you know how much the highest amount was?

A. Well, he said sixteen cans of milk, didn't he?

Q. Didn't you endorse these checks?

A. I endorsed some of them.

Q. How much was the largest check that you received? That's child's talk.

A. I do not recall. It was quite a large check. I didn't receive it. You are asking me the largest check that came for milk would have been quite a large check.

Q. You looked at the check didn't you?

A. I saw most of the checks I expect.

Q. Isn't it a fact that that is exactly why you started this suit to get these people off the farm, that now you had a hundred head of cattle there and the farm was paying and you didn't want these people to have their half-share did you?

(501)

A. Of course not. I wanted them to stay there and give my sister what they owed her, Mr. Taylor. I would have been very happy to have them stay there. Our only chance

for our collecting what they owed my sister is for them to stay there and pay her.

Q. Would you tell me the secret how to get you to say yes and no? • • • •

Q. Let's get to this day of August 26th.

A. I'd be very glad to.

Q. That's a surprise. On August 26th, I understood, to move along, you went to the office in the morning and you came home and you had lunch.

A. Yes, sir.

Q. And then you went out and saw the white bull in the barnyard, is that right?

A. Yes, sir.

Q. And did you get mad when you saw the white bull there?

A. No, he got mad. • • •

Q. Oh, the bull got mad at you?

A. Yes, sir.

Q. Could you express to me so I could know what a bull looks like when he gets mad?

A. I'll try. They kind of shake their head and paw the dirt and grumble something that sounds like to me "get out of this barnyard quick." I don't know that he said that.

Q. Wouldn't it have been better to have shot the bull instead of Mr. Clark and we wouldn't be here today.

A. You don't want seriously for me to answer that.

Q. You said that's what made you mad when you went down to the barn that you went down there to ask Mr. Clark to get the bull out of (502) there.

A. I didn't get mad. I got scared, Mr. Taylor.

MR. SMITH: At least as far as we are concerned, this is a serious lawsuit.

MR. TAYLOR: It is a serious lawsuit.

MR. SMITH: I have an objection to that line of questions and I think if the Court would once instruct the Prosecutor to stick to the issues in the case and ask questions civilly, we'd get along very rapidly.

MR. TAYLOR: If you can give me the formula to get the answers from Mr. Dye, I'll proceed in any manner you want me to. • • •

Q. You went out and you looked at the bull and the bull looked at you and you saw the bull was mad. Where were you when you saw the bull?

A. I was in the barnyard looking after Blackie and her calf.

Q. Isn't it a fact, Mr. Clark — Mr. Dye, that that calf was born four days before August 26th?

A. Not the calf that was with Blackie that day.

Q. Are you sure of that?

A. Positive. The calf appeared to be a brand new born calf, a little shaky fellow and still wet.

Q. Are you as sure of that as all of the rest of your testimony? • • • .

Q. What time would it be when this bull looked at you so mad?

A. When I was in the barnyard securing Blackie and her calf.

(503)

Q. What time would that be?

A. That would have been somewhere between twelve and two o'clock, along in there.

Q. Has anyone told you, Mr. Dye, that you have a persecution complex? • • •

MR. SMITH: I object to that as being incompetent, irrelevant and immaterial.

THE COURT: The witness may answer.

A. No.

MR. SMITH: If the Court please, we are coming to the same situation we had before. This is going to be an error in my opinion. He has answered the question. The question is whether anybody told him he had a persecution complex, didn't like the looks of a bull or something of that nature. Now, he can't Cross Examine on that.

THE COURT: Mr. Smith, you leave the Court in a peculiar position not being able to rule.

MR. SMITH: May we have the Jury excused so we can argue this once and for all?

THE COURT: The Court has no way of knowing what the next question is going to be.

MR. SMITH: He asks the question and that injects some thought to the Jury, and so help me he starts arguing and I have to keep objecting. • • •

(505)

• • • Q. But at least whatever he was doing was for the mutual benefit of both of you. The cattle at that time belonged to both of you and you had already on May 5th. you had stopped the milk check and so you couldn't get money, so that this feed was going for your mutual benefit was it not?

A. No, sir, and the, well the other things you have said aren't true either, Mr. Taylor, in the question. • • •

(506)

• • • Q. You know that it's up to the presiding Judge to sign injunctions do you not?

A. No, sir. • • •

(507)

• • • Q. You are going to get everything you want as far as this Jury is concerned in violation of all rules of evidence. The Judge has asked you time and time again, I have asked you please be responsive but you are going to be intent to answer just the way you like and if I have to go along in that basis, I'm going to change my entire attiude.

A. I hope you do, Mr. Taylor. I wish you would.

THE COURT: Just a moment. Will you proceed with your questions, Mr. Taylor.

MR. TAYLOR: Would the Court please inform Mr. Dye once again that he should not ad lib and go on beyond the questions that are asked — just this once.

THE COURT: I think the witness has been informed more than once that when he is in the witness chair he is required to be responsive to the (508) questions put to him. Mr. Dye has a background of being an attorney and perhaps it is difficult for him to assume that role but he

must refrain himself from contributing information that is not asked for and be responsive to the questions. • • •

Q. What conversation did you have with Judge Hartrick after he was through?

A. I told him about that it was impossible for me to discuss these matters with Mr. and Mrs. Clark, that they became abusive every time I tried to discuss them with him and that the only way that I could save the pieces for my sister out there was to get his help by trying to avoid the scorched-earth policy that they were pursuing from being carried through. • • • I told him about the assault that Mr. Clark had on me in May the last time I tried to discuss anything with him concerning the farm. I told him I was afraid of him, that I couldn't dare venture out very far from my house along there alone without (509) fear of being intercepted, having him come between me and my door • • •.

Q. That is fine. You have repeated. That's enough.

A. That isn't the entire conversation.

Q. That's all I want. If you want to bring any more, your counsel can. I have had the answer to my question.

MR. SMITH: If the Court please, I don't want the witness to repeat himself. My memory is the question asked "what conversation took place between yourself and Judge Hatrtrick." The witness is answering that and I don't think counsel has a right to stop him at any place in that conversation and say "That's all I want to hear." If it isn't true, Judge Hartrick is right upstairs.

THE COURT: Normally your position is right, Mr. Smith, but the witness has taken some time to elucidate the conversation. I haven't heard any of the conversation except what the witness has said. I think we have had sufficient answer to the question. • • •

(510)

• • • Q. I asked you whether or not you ever had the injunction signed. You can answer it yes or no.

A. I answered yes.

Q. Forget the surplusage. You know what it means in legal —

A. May I suggest something to the Court?

THE COURT: No. You answer the questions.

A. I was about to suggest to Your Honor please, that Mr. Taylor might address his objections to me and then to the Court instead of brow-beating me. If the Court is displeased with my demeanor, I'll be glad to correct myself.

MR. TAYLOR: Brow-beating you. That would be funny.

Q. So you went over with Judge Hartrick to Harvey Lodge's office. In your best judgment what time would it be?

A. Oh that was getting along late in the afternoon.

(511)

Q. That isn't what I asked you.

A. That's the best answer I can give you.

MR. SMITH: If the Court please, "what time was it? Late in the afternoon. Oh, that isn't what I asked you." Now, somebody is wrong here. I have been trying to keep quiet.

MR. TAYLOR: It could be me.

Q. Do you know how the clock runs from one to six?

A. Yes, sir.

MR. SMITH: I object to that. That is incipient insinuations.

THE COURT: The question may be answered. • • •

(512)

• • • Q. Isn't that what you told this Jury that you heard, overheard on Direct Examination? Didn't you testify and tell the Jury that you were at the telephone and you heard him directly talk with the Clarks and tell them not to cut any corn?

A. No, sir.

Q. Do you want this Jury to believe everything else you said with the same degree of that answer that you have just given, Mr. Dye.

A. As the good Lord is hearing, I have told the truth. I'm under oath, Mr. Taylor.

Q. Mr. Lodge told you in fact at the time he said, "Mr. Dye, you have cut off the Clarks' income and up to this time up to today the (513) Clarks have paid me, Mr. Lodge, one hundred fifty dollars in attorney fees and two days ago I returned fifty dollars to them to feed their two small children because you had cut off their income", is that not true?

A. That's false. • • •

Q. You mean to say that he did not show you where he returned fifty dollars to these people two days before your being there in his office, yes or no?

A. I don't recall whether he did it that day. He talked to me.

Q. That's a nice way isn't it? You don't recall. Do you want me to refresh your memory by bringing Mr. Lodge here? • • •

A. I would deny anything that is untrue, in front of Mr. Lodge or anybody else. • • •

Q. Didn't he further say and wasn't it your exact motive that if you could get this injunction to keep these people from feeding those cattle that then you could squeeze them right into a settlement without further delay? Answer yes or no.

A. The furthest thing from my mind.

Q. Answer yes or no.

A. No. • • •

Q. You know as a matter of fact that Mr. Clark went upon another farm (514) not belonging to you or anyone else and that the farmer permitted him to cut the outside corn all around a fifteen acre patch and bring it to feed your cattle which was exactly the same method as was being used at the time when he was cutting the corn on August 26th?

A. The first knowledge I ever heard of such a thing, the first I have heard of such a thing —

Q. You mean Mr. Clark never told you that he went to this other farm and brought this corn for your cattle?

A. No, sir. Mr. Clark wouldn't tell me anything excepting to h-e-double l —

MR. TAYLOR: If the Court please, I'm going to ask that Mr. Dye be held in contempt of Court.

MR. SMITH: Not that I'm afraid of that but I think Mr. Dye is doing a pretty good job of answering the questions asked to him and sitting there and listening to the tantalization, I wish he could do better. I have done all I can to induce him to listen to the questions and answer them briefly. I can see he is egged on all the time.

THE COURT: The Court does not consider he is in contempt. • • •

Q. While you were in that office in Mr. Lodge's office, you had a briefcase of some kind with you did you not, Mr. Dye?

A. I may have. • • •

(515)

• • • Q. And you reached down on the floor and picked up that briefcase while you were seated in front of Mr. Lodge and you put your hand in there and you took it out again three times, did you have a gun in that briefcase? Answer yes or no.

A. No, why, no. • • •

(516)

• • • Q. Let us presume that it took you fifteen minutes from the time you walked down the stairs and of course in your physical condition those stairs are steep, you'd have to come down slow because of your heart condition and you'd walk over to the parking lot and if Dorothy Lodge was here to testify and were to tell you it was six-fifteen when you left, let us presume then by the time you got in your car it would be six-thirty. Do you follow me?

(517)

A. I'm following you. • • • I don't know for sure what time it was. • • •

Q. Do you recall, Mr. Dye, being in Mr. Lodge's office and pacing up and down his office with your face white, pacing up and down you were so angered because you can't get that injunction? Do you recall that?

A. That didn't happen, no, sir.

Q. Well, we'll have Mr. Lodge here. • • •

Q. If you drive three miles and the first two miles will be twenty-five miles an hour. The next mile will be thirty-five miles an hour and you have to go out the Dixie through Drayton Plains, (518) where the limits are thirty-five miles an hour, you know that as a matter of fact, you see it posted. You drive it all the time. Do you not Mr. Dye? • • •

MR. SMITH: May I make this objection to the line of questioning. • • • The line of questioning seems to me at best could only go, if counsel has any other purpose than to establish the time of the offense, I'd like to know about if but if that's all of his purpose and he can fix the time any better than it has been fixed, I will consent to it.

MR. TAYLOR: Mr. Smith, I don't know how much more I can tell you about this case. Before you ever started, my files were open and so forth. I haven't changed my method or matter. Everything I had was open to you months in advance.

MR. SMITH: Pardon me, just a minute. Seeing counsel has made that statement, I haven't seen (519) any files. I learned for the first time during the course of this trial that the gun was eighteen inches from Mr. Clark when it was fired. I don't think counsel is being quite fair with me. • • •

Q. What is several times? You tell me. You are a lawyer. What would you expect if you asked a client to tell you how many several times is? How many times would you expect? • • •

(523)

• • • Q. Isn't it a fact, Mr. Dye, that from the time you left Mr. Lodge's office at which time you agreed with Mr. Lodge that you would not in any way interfere with the Clarks that you left that office and drove like a madman to get out there so that you could get over to the barn

because you knew the Clarks would be there to feed the cattle so that you could have your gun and if he didn't do as you wanted him to, you were going to take care of him just as you told Mr. Satkowiak that you would use the gun?

A. That is not true, Mr. Taylor. • • •

(524)

• • • Q. But at that time it had not been determined. This case was (525) still in Court on the day you shot Mr. Clark? • • •

(526)

• • •

• • • Q. Let me show you this order which was entered and it reads as follows: "At a session of the above Court, held on the 25th day of November, 1955, at the Courthouse in the City of Pontiac in said County. Present: Honorable Paul R. Cash, Circuit Judge;" As to whether or not there was an order entered in your case which was a complete settlement and adjudication of file number 27819.

A. Yes, sir.

Q. Now, referring to the paragraph 2 — "The plaintiff shall within two weeks submit to Harvey L. Lodge, defendant's attorney, proof of the settlement of all of said obligations." Now this was signed on the 25th of November. It was filed on November 28th and I will ask you as a matter of fact even to this day you have not complied with that order, yes or no? • • •

(527)

• • • Q. Well, it could have been. Did you start on December 1st, putting ads in the Fenton Independent paper, the Flint paper, the Pontiac Press, the Holly paper pertaining to the cattle lost, strayed or stolen from the Dye farm? • • •

(531)

• • • Q. I am asking you — I am not asking your ideas.

A. I am not through with my answer. I received —

MR. TAYLOR: He said "I have some ideas". • • •

A. I received —

Q. Will you please just be quiet while are are arguing with the Court?

A. Don't you think it would be better that you address your objection to the Court? • • •

(532)

• • • Q. You don't know who called you, do you, Mr. Dye? Do you know who made the telephone call? You can answer that yes or no.

A. No, sir.

Q. I didn't think you would. Now, there has been some question here and when Mr. Bremer — just a minute.

A. I haven't given you the other reasons. May I finish or not?

THE COURT: I think I gave you the opportunity.

A. Well, counsel, if the Court please, he interrupted me.

THE COURT: Let's proceed with the matter.

Q. Now you complained that you made a statement to the newspaper through your attorney, Mr. Donald Bremer, did you not, directly to the Fenton Independent? Let me show you the statement and I will ask you whether or not that is the statement you made. (Marked People's Exhibit 42). • • •

A. It appears to be the statement I made.

Q. Go ahead. You can read. • • •

(533)

• • •

A. "Having been held in jail until this afternoon, I have been at a complete disadvantage in the matter of the version given to the public of the event which gave rise to my incarceration. I have not yet seen any of the newspaper articles on the matter but I am told that some have obviously originated from the other side and therefore have made no mention whatever of the true facts as experienced by me. I can only say that I have been the victim of a vicious

assault at my own residence which but for the grace of God might well have snuffed out my life and for this grace I am humbly grateful. I suppose that there will be a Court trial in this matter. The evidence then presented will show that I am innocent of any wrongful act." That is true.

Q. Since you had some indication, one way or another and you were making a statement and you contended that the other side made a statement that was strictly false, if you are going to make a statement why didn't you at that time tell them your side of the trial.

A. Tell who?

Q. The newspaper. Why didn't you tell them you wanted to make a statement instead of merely calling the Clarks a liar? • • •

Q. Why naturally! If you did nothing wrong, why would you expect a Court trial, in all your innocence? • • •

(534)

Q. All right. We won't ask you to. This is good. "I can only say that I have been a victim of a vicious assault at my own residence which but for the grace of God well might have snuffed out my life:" Do you know that some of the people in Holly were going around snuffing their noses?

A. Mr. Taylor, I take it you don't know the Lord.

MR. TAYLOR: If my Lord — let's not get into that. It is four-thirty, Your Honor. • • •

(535)

PROCEEDINGS HAD FEBRUARY 28, 1956

CROSS EXAMINATION (Continued)
Conducted by Mr. Taylor:

• • •

Q. Mr. Dye, did I understand you to state on Direct Examination that when Mr. and Mrs. Clark got into the truck and were driving out that they headed their truck

directly for the middle of your car at a terrific speed and crashed into your automobile? • • •

A. Well, they cut their truck.

Q. Did I understand you to say Mr. Dye, that Mr. and Mrs. Clark, when they got in their truck that they started their truck up in high speed and started for your car and struck your car in the side?

A. I don't know what you understood, Mr. Taylor. I'm trying to tell you what happened.

Q. I am asking if that is the testimony you gave?

A. That isn't exactly the way I gave it to you. I'd be glad to give it to you. I testified they struck my car, swerved suddenly and struck my car, driving, oh, eight or ten feet on my lawn to do it and then cut suddenly away.

Q. They crashed into the side of your car with the front part of their car is that your testimony?

A. The front of their car was headed for my car when I threw up my arm. The last that I saw of it, the right front corner of their truck was headed for my car.

(538)

• • • Q. Well, Mr. Dye, if you needed a doctor at around between seven and eight or eight-thirty, whatever time it might have been, how do you account for the fact that when I was taking a statement from you early in the morning you never asked me for a doctor at any time? The only thing you complained of was a sore shoulder?

A. Over at Flint, I told you I was in pain.

Q. You did not ask me for a doctor did you, Mr. Dye?

• • •

Q. You say your could not understand why you were being held and you knew at that time a man had been shot and you are saying to this Jury now with all your legal experience and background that you (539) could not understand why you were being held when you had refused to divulge any fact or circumstance as to anything that happened?

A. I hadn't refused. I was being held there and just sitting and sitting and I had told that I had been attacked

in my own premises, and that he had said he was — well, you don't want me to answer it. • • •

(540)

• • • Q. I heard legally and morally, I heard it so many times I didn't know whether I was — under any circumstances do you want to say on this stand that you told me one fact or circumstances except that you were upon your own farm and that you were assaulted and that you had done nothing morally or legally wrong. In fact you said that about ten times didn't you? Isn't that a fact? You can answer that yes or no.

A. No, I told you —

Q. I'm not going to put questions.

A. I'm — I ask the Court the privilege of answering that question, if the Court please. I did tell you — • • •

(541)

• • • Q. Now, you are according to the testimony on Direct Examination, according to your testimony on Direct Examination, you testified, you can correct me if I'm wrong, that at the time that you (542) claim that Mr. Clark was trying to shoot you and you went through the gestures to show us how he was trying to do that, that you threw your hand back and threw the gun away.

A. I didn't throw the gun away until after I had fallen, Mr. Taylor. • • •

Q. Then you wish to infer then that Mrs. Clark, by holding on to this gun saved your life that night?

A. I believe she did.

Q. And yet you would turn around and call this woman a liar? • • •

(543)

• • • Q. Now, you contend of course that all of this difficulty arose because of the manner in this farm was being kept, and the negligent and careless manner that Mr. Clark was taking care of this farm. That's right, isn't it?

A. No, sir, that isn't near it. • • •

(547)

• • • Q. You brought up something about this assault and battery that took place. Was that on May 7th? Was it not, Mr. Dye?

A. Yes, sir.

Q. Do you recall at that trial that there were numerous persons that testified that you ran into that farm and grabbed — • • •

(Objection by Mr. Smith overruled).

(550)

• • • Q. Mr. Dye, on this particular day, May 7th, isn't it a fact that you went into the Clark's farm where he was there with other persons and you grabbed him by the lapels and shook him and when he pulled away from you, you even pulled a part of the lapel away, isn't that a fact?

A. No, sir. That would be suicide to grab Bill Clark. No, sir. • • •

(551)

• • • Q. Mr. Dye, did you have — is Mr. Dahon in the Courtroom?

A. I don't see him here this morning, Mr. Taylor, but he can be gotten hold of if you want him.

Q. Didn't you and he right here in the hall, didn't he come to you and say to you "Mr. Dye, you are going to have to tell me how I'm going to testify in this case?"

A. No.

Q. You deny that?

A. Of course. Neither I nor Mr. Dahon would say a thing like that.

Q. Is that a self-recommendation that you have just made?

A. Well, no. I don't try to praise myself.

Q. Isn't it a fact, Mr. Dye, that you have been married five times?

MR. SMITH: Oh, if the Court please, that is immaterial and irrelevant. It expresses the venom of (552) the Prosecutor but outside of that it throws no light on this case what-

soever. If he has been married a hundred times — this is a case of shooting.

THE COURT: I don't see how the background and basis has been established for asking the question at this moment, Mr. Taylor.

MR. TAYLOR: All right, Your Honor. We will lay a different foundation.

Q. Now, you know it is one of the fundamental known rules of our profession, Mr. Dye, not to interfere with another attorney's client. You know that, don't you?

A. Well, yes, of course.

Q. Then do you deny that you told Mr. Clark that if he did not get rid of his attorney that you would certainly see to it that he paid dearly?

A. I certainly do deny it Mr. Taylor. No such thing as that.

Q. You heard him testify to it, didn't you?

A. I don't know if I did or not. I don't recall. I don't think you had him testify to very much, Mr. Taylor.

Q. Well, I'll call him back to the stand, don't worry about that, Mr. Dye.

A. That is your privilege, sir.

Q. I'll certainly straighten that out. In fact that is not the first instance when you have been charged with the same thing of telling other people "Don't get an attorney."

MR. SMITH: If the Court please, just a minute before you answer it. Counsel asks a question, gets a negative answer and then the question here involved is in fact "that is not the first instance." The question is improper inasmuch as it assumes that he has answered the question yes, instead of no. In other words it assumes that he has admitted that (553) he tried to get Mr. Clark to change his lawyer for some reason or other.

THE COURT: I think the witness may answer the question.

Q. Has it ever come to your attention?

A. I have no recollection of ever saying a thing like that to anybody.

Q. I didn't ask you whether or not you have any recollection of saying it. I'm asking you whether or not someone else didn't tell you, in fact, file a pleading in a Court case stating that you did.

A. That I did what?

Q. That you told them not to get an attorney?

A. I never told anybody such a thing as that.

Q. I didn't ask you that, Mr. Dye. • • •

MR. SMITH: He testified he never told anybody that. • • • That still would be irrelevant and couldn't be impeached on. • • •

(554)

• • • Q. Now, do you recall how soon after the alleged assault and battery, of which Mr. Clark was found not guilty, that you started this suit? • • •

(555)

Q. Referring to People's proposed Exhibit fifty which appears to be a check on the State Savings Bank of Fenton, dated November 23, '55. "Pay to the order of Viola Dye, balance of account." Signed L. Harvey Lodge and William C. Clark. I ask you if that is your sister's endorsement on there.

A. It appears to be hers, yes, sir.

Q. That is the check that you received wherein the Court ordered the Clarks to turn over all the cash they had in the bank to you is it not?

A. Well, that isn't just exactly the way it was.

Q. That will be close enough. • • •

A. Oh, what became of the money.

Q. I'm talking about the check. You don't know whether it was deposited in the Fenton Bank to your account or to your sister's account? • • •

(556)

• • • Q. You couldn't apply this check to a bill, Mr. Dye, because this check is not made payable to you. You couldn't under any circumstances unless you committed forgery.

A. I certainly didn't commit forgery, sir. * * *

Q. When did you make it, the last accounting to your sister? * * *

(557)

* * * Q. If you don't run the farms, why are you out there telling the people who have a lease to run these farms as to what corn they should cut and what cows they should feed? What right do you have under this lease?

A. * * * Neither Mr. Clark nor my sister has any interest in this little cow that I owned before I ever knew there was such a person as Mr. Clark and that's why I tend to my own little cow.

Q. That is the little black cow that you told me about. That's the one you told me about, that's the little black cow. You said, "I love that little black cow."

A. I don't know if I put it in those words. I think a lot of Blackie. She is a little pet. * * *

(558)

Q. Even though you were well aware that Mr. Childress here, back here, had delivered all this corn to your farm for your benefit and which afterwards turns out that you got all this hundred head of cattle, you even to this day have not paid him or given him in kind the corn that he gave to your farm quite sometime ago have you? You can answer that yes or no.

A. I haven't given Mr. Childress anything.

* * * Q. He is lying is that what you are trying to say? * * *

Q. Why don't you give him back the corn or why don't you pay him for it? * * *

(559)

* * * Q. Why would you try to — you know very well that you received a check signed by the Clarks for forty dollars to pay Sitkowiak. Why did you try to force him to take a thirty dollar check when you knew positively that forty dollars was owing?

A. That isn't true. He asked me for the thirty dollars and he sent me a statement calling for thirty dollars That's all he ever asked me for.

Q. Do you have that statement, Mr. Dye?

A. Oh, yes.

Q. Would you produce it?

A. Sure.

Q. Thirty dollars?

A. Sure. Describing the pigs, I can also tell you — • • •

Q. Didn't Mr. Sitkowiak tell you when this statement was made out that it was made out by his wife because there was some mention that you were only paying thirty dollars and that he did not make it out and it was made out in error by his wife, and at that time you had possession of the check from the Clarks for forty dollars?

A. He never told me anything like that. I had a check which they sent to my sister to sign for forty dollars for the pigs but it was more than he said we owed him for the pigs.

(560)

Q. Have you paid him even the thirty dollars as of today?

A. Yes. I gave him a check and he later sent it back to my office. He didn't give it back to me. I have never seen the man since then.

Q. Now, I asked you previously whether or not you had ever been arrested and convicted. Of course you said "No". I'm going to ask you now have you ever been arrested?

A. Well, for traffic matters or something like that.

Q. You want to say now that it was only for traffic matters, Mr. Dye?

A. That's all I have any recollection of. That was many, many years ago.

Q. If it was for anything else, you have forgotten is that right?

A. I don't believe there was anything else. That would have been many, many years before that happened, before I came to Michigan and then some.

Q. Wasn't it just before you came to Michigan? You say many years ago.

A. I don't remember. I imagine it would have been fifteen better than fifteen years ago or thereabouts.

Q. Let me ask you this question. You made application to the State Bar for admission to this State under the non-resident Statute did you not?

A. I don't recall. I made application for admission. I was a resident of Michigan at the time.

Q. It is possible that you could have filed an application as a non-resident for admittance to the Bar?

A. I wouldn't think so, no, sir. I was a resident at the time. I don't know why I would have filed.

Q. Then I asked you whether or not you had been a Justice of the Peace or Magistrate or Judge during a period of 1938 to 1941 and you told me that your office ended at the last day of December, 1938, is that correct?

(561)

A. 1937 I believe. I think it was Mr. Taylor.

Q. Then I'll ask you this question. Isn't it a fact that you forwarded to the State Bar of Michigan a letter which was directed to you in your name at your home stating in that letter that you were a Magistrate from 1938 to 1941 and that you forwarded that letter to the State Bar to support your application for admission to become a lawyer in this State?

A. I certainly wouldn't think I would do that because that isn't true.

Q. Is the clerk here from the Supreme Court of the State of Michigan?

MR. SMITH: At this time I wish to impose a formal objection that this is an irrelevant, collateral matter, could not impeach by records of the Supreme Court of the United States as far as that is concerned.

THE COURT: The witness may answer.

MR. SMITH: May I ask counsel to commit himself on the record as to his claimed materiality and his purpose in introducing the exhibit. * * *

THE COURT: Are you about to offer such a letter, Mr. Taylor?

MR. TAYLOR: Mr. Dye testified, Your Honor, that he did not forward a letter which was addressed to (562) him stating that he was a Judge from 1938 to 1941, one of the letters which he forwarded to the State Bar to support his admission to become a lawyer of this State. We have this letter and we propose in the first instance to permit Mr. Dye to refresh his memory and then we are very pleased to offer it if there is no objections. • • •

THE COURT: I think you have stated, Mr. Taylor, that you are going to attempt to refresh the witness' memory at this time. Any objection to that?

MR. SMITH: I will withdraw the objection for that purpose, but for the purpose of impeachment to testing the credibility —

THE COURT: Let's proceed.

MR. SMITH: I suggest you show it to the witness, rather than reading it. We haven't admitted it in evidence.

MR. TAYLOR: I will refresh his memory at the proper time.

Q. Mr. Dye, I will ask you whether or not —

(563)

MR. SMITH: If the Court please, counsel has asked for permission to examine this witness for the purpose of refreshing his memory. Now, instead of handing it to him to refresh his memory, if he has that for a legitimate purpose, I think he proposes to read it or at least recite excerpts from it.

MR. TAYLOR: I think you are presumptuous, Mr. Smith.

THE COURT: It is very difficult to rule on a question until it is presented.

MR. SMITH: Counsel has, I shouldn't say this, he asks the question in such a way that in a long trial like this, it's difficult for the Jury to retain whether the witness said it or whether Mr. Taylor said it. He puts stuff in evidence by his form of the question which I am objecting to.

THE COURT: I have great confidence in this Jury relying upon answers and not on questions. • • •

Q. Permit me to show you People's proposed Exhibit 52 to give you an opportunity to refresh your memory and ask you whether or not that is not a letter addressed to you, forwarded to the State Bar supporting your petition for admission?

A. This is a letter addressed to me. As to whether or not it was forwarded to anybody by me or by anybody else, I do not know. (564) They'd have to answer that themselves.

Q. Well, we can do that. We have the records here. I'm asking you now, do you know of your own knowledge, do you know whether or not you ever received that letter?

A. No, sir. I do not know.

Q. Even though it's addressed to you, you have no recollection of ever receiving it?

A. I may have. The facts stated in it are not correct but it is not signed by me. It's signed by another individual.

Q. But if you did send them in to the State Bar and at that time you knew it were not true, you were in fact perpetrating a fraud on the State Bar of Michigan?

A. If I done that I certainly would have. I certainly never done anything like that, not when I was trying to get admitted. • • •

RE-DIRECT EXAMINATION
Conducted by Mr. Smith:

• • •

(566)

• • • Q. I will show you Defendant's Exhibit Q and ask you to identify that for the record, not reading it into the record but merely telling us what it is.

A. That is the receipt signed by the gentleman for the thirty dollars that I gave him.

(567)

MR. TAYLOR: If the Court please, that is certainly contrary to the question that Mr. Smith asked. He asked to identify it. It's all right. You testified to it.

A. I thought he asked me what it was. • • •

MR. SMITH: I offer Exhibit Q in evidence.

MR. TAYLOR: No objection. Anything that will help.

THE COURT: It may be received.

MR. SMITH: I wish to read into the record Exhibit Q. "7-7-55 Received thirty dollars in full for two sow pigs — one black and white; one red and white. These are the only swine I have sold William C. Clark and this is the full price. Paid by Clifford B. Dye personally. Signed. Mathew Satkowiak." • • •

(574)

• • •

THE COURT: Do you have any further questions, Mr. Taylor?

Q. Do you know a Mr. L. E. Church?

A. Yes, I know he is a man that lives across from the White Lake farm. • • •

(575)

• • •

MR. TAYLOR: Do you recall inviting him out into the road for a fist-fight as a dispute over a fence?

A. Of course not, no.

Q. He lives at 511 East Farnum in Royal Oak?

A. He might live there.

Q. Do you deny that?

A. Of course I deny that. • • •

MR. TAYLOR: That's all.

MR. SMITH: The defense rests.

DONALD F. WINTERS, testified for the People on rebuttal as follows:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

Q. Will you state your name in full, sir?
A. Donald F. Winters.
Q. What is your business or profession?
A. Deputy Clerk of the Supreme Court of Michigan.
Q. • • • I will ask you whether or not you're custodian of the files of the applicants, both non-resident and resident, who are seeking admission to the Bar?
A. I am. • • •

(576)

• • •

Q. Do you as a matter of fact have in your possession a non-resident petition for admission to this Bar signed by one Clifford Dye?
A. I do.
Q. Will you produce it please? I ask this be marked People's proposed Exhibit fifty-three. (Exhibit marked). I show you People's proposed Exhibit 53. I will ask you, sir, if you can identify that instrument?
A. This is an application of a non-resident attorney filed in the office of the Clerk of the Supreme Court and signed by Clifford B. Dye.
Q. And the date, sir, that that instrument was dated?
A. It is dated February 2, 1944.
MR. SMITH: If the Court please, I don't think it is legitimate evidence. However, I don't see anything that we would care to exclude from the Jury so I won't raise the objection.
THE COURT: It may be received.
Q. You were also subpoenaed to produce from that file a letter from one Thomas H. Young, an original which bears the address and name of Clifford Dye which was forwarded to him or at least the letter, did you find a letter from one Thomas H. Young with reference to Clifford Dye in

your file with the application for admission as an attorney to the State of Michigan?

A. Yes.

Q. Do you have that letter, sir?

A. Yes, I do.

Q. This letter of course, if the Court please, has been marked as People's Exhibit fifty-two. This letter was with that particular file of Clifford Dye? • • •

(577)

• • • Q. Does that letter state that Mr. Dye —

MR. SMITH: Just a minute, if the Court please. Until the exhibit is admitted in evidence, I don't think he has any right to ask the witness what the letter states.

THE COURT: Your objection is well taken.

MR. TAYLOR: I move for the admission of the letter, if the Court please, from the Second Magisterial District of Louisville, Kentucky, signed by one Thomas H. Young, addressed to Honorable Clifford B. Dye, R. R. 1, Fenton, Michigan as of May 5, '43.

MR. SMITH: May I cross examine the witness, Mr. Taylor?

MR. TAYLOR: Yes, sir.

CROSS EXAMINATION
Conducted by Mr. Smith:

• • • Q. You were not a Deputy Clerk then at the time this letter was received there?

A. No.

Q. You have no knowledge as to how it was received?

A. No.

Q. You merely found it in the file?

A. That's correct. • • •

(578)

• • Q. Is it customary for the Examiners now to make inquiry when a person has practiced in another State?

A. Yes, it is.

Q. You have no personal knowledge than except as you have found the practice to be in the last three years is that correct?

A. That is true.

Q. As to what the practice was in 1944, you have no knowledge?

A. No.

MR. SMITH: I will object to this particular letter if the Court please, for two reasons. In the first place this witness can only testify that it is in the file. Secondly, it would be an attempt I take it to impeach Mr. Dye on the dates that he was Judge in Louisville, and that is a collateral issue which could not be attached by direct evidence to impeach the witness.

MR. TAYLOR: If the Court please, credibility is also material.

MR. SMITH: Credibility of other witnesses. It would have to be impeachment if anything.

THE COURT: The letter came up in relationship to Mr. Dye's knowledge of criminal proceedings. Mr. Dye has examined the exhibit. It has now been shown to be the original part of the records of the Supreme Court and it may be received.

MR. TAYLOR: May I read it for the record. * * * (579) "For the Second Magisterial District, Room 106 — Jefferson County, Thomas H. Young, Magistrate; H. Lawrence Ott, Constable, May 5, 1943. Honorable Clifford B. Dye, R. R. 1, Fenton, Michigan. Dear Cliff: I received your first letter some time ago and because of my work on the War Labor Board, this work has taken me out of town for long periods at a time, and your first letter came at a time that I was out of town. I have had the official records checked for the periods of January 1, 1938 to and including December 31, 1941, which is a period of four complete years while you were presiding Judge of this Court. The figures show the following:

Total Civil Cases	28,882
Total Criminal Cases	2,490

The best estimate that I can arrive at as to the amount of money handled by your office during that same period is approximately one hundred forty-five thousand six hundred dollars which includes Judgments, Costs and fines. I could give you a complete statement if I had the complete records. With kindest of regards, I remain, Yours truly, Thomas H. Young."

Q. Do you also have, sir, the application for admission to the State Bar as a student?

A. Yes, I do. • • •

(581)

• • •

THE COURT: Fifty-four is received, and the Court has not been advised as to what it is yet.

MR. TAYLOR: Fifty-four is, if the Court please, is an application of a student for the admission to the State Bar [illegible] by Clifford B. Dye, subscribed and sworn to on the tenth day of June, 1944, by a Notary Public in Wayne County. Since these are from the Supreme Court, counsel, do you have any objection to me returning them to the custodian to return?

MR. SMITH: Not when we are through with them, but the time being, I want to Cross Examine the witness when you are through.

CROSS EXAMINATION (Continued)
Conducted by Mr. Smith:

Q. Mr. Winters, Exhibit fifty-three, you identified as application of non-resident attorney. • • •

A. It is an application filed by a man who has been admitted in another State and who wishes to be admitted in the State of Michigan on motion without taking an Examination.

(582)

Q. Do your records show whether or not Mr. Dye did take the same examination that other law students had to take on that particular year?

A. He did.

Q. Do your records show whether or not he passed the first time he took it?

A. He passed it. • • •

Q. Referring to the Exhibit number fifty-four, entitled Application of student, state whether or not it reads "I have resided at the following places during the past five years, giving the period of each place: Louisville, Kentucky for thirty-five years; past two years at Fenton, Michigan."

A. That's correct.

(583)

Q. So, so far as any possible implication that the man represented he was a resident of Kentucky, there was no such implication involved was there?

MR. TAYLOR: If the Court please, I think the instrument itself —

THE COURT: The question may be answered. • • •

A. No, there wasn't.

Q. So far as the application is concerned, of a student, and the application of non-resident attorney, can you point out anything that is irregular in any one of those applications?

MR. TAYLOR: If the Court please, this witness has testified that he is custodian of these instruments and at the time that these instruments were filed, he was not in the office. He has only been there for three years. • • •

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(583)

L. HARVEY LODGE, a witness for and in behalf of the People of the State of Michigan, being first duly sworn, testified on rebuttal as follows:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

Q. Counsel, what is your full name, sir?

A. L. Harvey Lodge. • • • I'm an attorney, sir.

Q. I will ask you whether or not you know a William Clark who is in (584) the Courtroom?

A. Yes, I have known William Clark for, oh, practically since he was a baby.

Q. I will ask you whether or not you ever represented him in a professional capacity?

A. Yes, I began to represent him in the Spring of 1955.

Q. Bringing this interrogation specifically to August 26th of 1955, can you recall that particular day, sir, with any degree of accuracy?

A. I certainly could for divers reasons.

Q. On that particular day did you see the defendant here, Clifford Dye? * * *

A. Well, yes. I was in my office. My wife was there and Mr. Dye was brought to my office by the Honorable George Hartrick, Circuit Judge. * * *

(586)

* * * Q. Do you recall, Mr. Dye?

A. I beg your pardon. You called me Mr. Dye.

Q. I apologize. Mr. Lodge, was there any conversation that (587) particular day about any money and fees that were paid to you and money going to Clark in any way in the presence of Mr. Dye?

A. Well, of course, you understand in three and-a-half hours, there was a lot of conversation and, oh, I recollect about four days before this that I had given the Clarks fifty dollars to feed their family. I told him about it on that occasion. * * *

(590)

* * * Q. Did it ever come to your attention, sir, that Mr. Dye had stated that Mr. Clark should not be represented by an attorney? * * *

MR. SMITH: I object to that as calling for hearsay.

THE COURT: You will have to testify as to your own knowledge and not from hearsay.

(591)

Q. Did it at any time come to your own knowledge that Mr. Dye had informed Clark that he'd get along better without an attorney?

A. I could answer that yes or no, if it is permissible. * * *

(595)

* * * Q. Thank you, sir. That is exactly what I want. Now, will you describe the type of suitcase or briefcase or law-bag or brief whatever he had with him, that is Mr. Dye. What he was carrying? * * *

Q. Did he — what did he do if anything with that bag more than once, if you can recall, in your office? * * *

A. Well, I know that he reached in and out of it two or three times. * * *

(596)

CROSS EXAMINATION
Conducted by Mr. Smith:

(599)

* * * Q. Was there something about Mr. Clark that attracted your attention and prompted you to put in this Cross-Declaration that he had developed Psychoneurosis?

A. I don't say Psychoneurosis. He hadn't developed it. If you use the word anxiety as it is stated there and properly, then I can answer you. I said a psychoneurosis anxiety. I suppose that was something that I borrowed on that. I meant a fear and I would say very definitely from May 7th on, I saw that attitude of fear in young Clark. * * *

MR. TAYLOR: If the Court please, the question was answered. He stated he did it from observation. If he saw that Clark (600) was in a state of anxiety for fear of his life because of certain circumstances, being counsel he would have every right to put it in there if he noticed it and that is his testimony that he did it from observation. * * *

(604)

• • • A. Very definitely, Mr. Smith, we in the settlement in the end of the year, we turned over to Viola Dye over sixteen hundred dollars plus two hundred dollars to Bremer — over eighteen hundred dollars which is more than that out of the bank and by another company. • • •

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(607)

DOROTHY LODGE, a witness for the People, being first duly sworn, testified as follows on rebuttal, in part:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

Q. Your full name?
A. Mrs. Harvey Lodge, Mrs. Dorothy Lodge. • • •
Q. • • • Do you recall with any degree of accuracy August 26, 1955?
A. I do. • • •

(608)

• • • Q. Did you have the occasion to have Mr. Dye in view during the entire time that he was in your husband's office on August 26th?
A. Practically the entire time • • •.

(609)

• • • Q. How many times would you say you saw him get up and walk? Was it just once or was it numerous?
A. Oh, numerous times. • • •
Q. Would you say that Mr. Dye was angry while he was in your office that afternoon?
A. By the set of his face —
MR. SMITH: That's calling for a conclusion, if the Court please.
THE COURT: She can describe his appearance and conduct but perhaps conclusions are improper.

MR. TAYLOR: You may answer.

A. By the set of his face, yes.

MR. SMITH: I ask that be stricken out.

THE COURT: I had ruled that the question of whether or not he was angry was a conclusion. Now, she perhaps is able to testify as to his appearance and what he did but as to her conclusion (610) as to his mental condition, that would not be proper.

Q. Tell us what about his face? What was there about it?

A. Well, I —

THE COURT: Just what you saw.

A. Set lips. Very set lips.

Q. An air of determination?

A. Yes.

MR. SMITH: The question in itself and the answer, I ask that it be stricken out. It again is a conclusion — "an air of determination".

THE COURT: I think that answer may stand. • • •

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(615)

GUS CHILDRESS recalled to stand, having testified previously and being still under oath, testified as follows, in part:

RE-DIRECT EXAMINATION
Conducted by Mr. Taylor:

• • • Q. You testified previously that Mr. Dye had ordered you off his property when you were hunting in that area?

A. Yes. • • •

WILLIAM CLARK, complaining witness, was recalled to the stand and testified further in part as follows:

RE-DIRECT EXAMINATION
Conducted by Mr. Taylor:

(616)

* * * Q. Mr. Clark you heard Mr. Dye testify that you deliberately took the gun while it was in his hand and pushed it over against his head in an effort to try and shoot him?

A. Yes, sir.

Q. Did you do that?

A. No, sir.

Q. Did you at any time have that gun anywheres near his head?

A. No, sir.

* * *

(617)

Q. Where were you when you were first aware of the presence of Mr. Dye?

A. I just stepped out the barn I'd say not over one or two steps. I stopped.

Q. Why did you stop?

A. Because Cliff was standing there and started to talk to me.

Q. Just take it one step at a time now. We will refer again to Exhibit three. Is that the barn?

A. Yes, sir.

Q. Where were — where you see a man standing, there was Mr. Dye standing anywheres near that spot?

A. He is right around, he is two feet one way or more this way a little bit.

Q. Towards you?

A. No, no. On the corner. That man is standing in a little bit. He just come down just to the edge of the barn but there is a little hill where that man is standing.

Q. Where were you in relation to this picture when you first saw Mr. Dye?

A. I walked out this door and I was standing possibly in front of this window.

Q. What conversation, if any, took place between you and Mr. Dye?

A. Well, he first seen me, he started on the barndoor laying down here. I said "Cliff, your Hereford bull went through there last winter." He started one more argument and started out. I said (618) "Just see my attorney. I don't want to argue with you. Harvey told me if you want to argue, to see my attorney." I was paying Mr. Lodge what I could afford and he told me not to even talk to Mr. Dye.

Q. What happened then?

A. I said "Cliff, don't bother me. I'm trying to get done before dark on these chores. See Mr. Lodge. Anything you have got to say, say to him. It's out of my hands."

Q. What did Mr. Dye do then?

A. Mr. Dye reached his hand in his pocket and pulled out a gun and was playing with it or something and it went off in the ground. This was not minutes. This was seconds. He pulled the gun out and hit me in the stomach — eighteen feet apart. The next time he shot, the gun, he missed me by not over three feet. At that time I realized he meant business. My wife and children were crying. I was out. I had the bullet. I figured if I got the gun, the rest of the Jury and people could take care of him. I didn't know if I was going to live or die at that time. I kept moving. I didn't drop. Blood kept coming out of my mouth. My main idea was to get in my pick up and get out of there and I tried to do so.

Q. Do you recall when the gun left Mr. Dye's hand, if it ever did?

A. I can't tell you when the gun left Mr. Dye's hand.

Q. Did you see the gun at any time out of Mr. Dye's hand?

A. Yes, sir.

Q. Where was it in relation to his body?

A. The gun was laying, well, Mr. Dye and I was on our sides like and the gun was laying over here and Cliff was

trying to get hold of the gun. All I had to do is reach over and get the gun and shoot him right then. If I wanted to kill Mr. Dye, I could have shot him that night. He testified for three days that I was going to shoot him.

Q. Take it easy, Mr. Clark. Don't get excited. When you first saw (619) the gun out of Mr. Dye's hand, how far was it away from his hand?

A. I'd say six inches. Six to eight inches.

Q. Did you have any conversation with anyone, Dye or your wife or anyone else at that time?

A. Mr. Taylor, blood was coming from my mouth and the main thing I wanted was my wife to get the gun. When I was on the ground she come around there. I said "Lois, pick up that gun. There it is." I didn't know if I was going to lay and die or if I had the strength to get to the truck and get out of there. I wanted her to get the gun. I wanted her and the kids to get out of there. That's what I wanted done, but the woman stood there and said "Come on". She wanted me to go. I didn't think I could go myself. I got up and walked to the truck with my wife and the oldest girl — by that time the kids, when I got the truck to the gateway, my wife got in the back with one kid and I got in the front with the other child and I drove out of the yard.

* * *

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(620)

RE-CROSS EXAMINATION
Conducted by Mr. Smith:

Q. Mr. Clark how many shots were there altogether?

A. I say there was three, Mr. Smith.

Q. What shots struck you?

A. The second shot.

Q. Where was Mr. Dye when the second shot was fired?

A. Standing, Mr. Smith, in the same place he shot all three of the, not over a foot apart.

Q. That would be by the northeast corner of the barn where you first saw him?

A. Yes, sir.

Q. When he backed up now after he shot the second shot — this second shot now, he is standing at the corner of the barn and shot three times. He shot the second shot and that's the one that hit you, you say.

(621)

A. I say that is the one that hit me. I found the other shots. I seen the other shot after it left the gun.

Q. How far were you away from him at the time you say he shot you?

A. I'd say fifteen to eighteen feet or I might have been closer. Right around fifteen to eighteen feet. I never did measure it, sir.

Q. Were there any, was the gun discharged at all when you fell on him?

A. No, sir. I had Mr. Dye's hand in the air. I didn't get shot eighteen inches like I heard testified in the Courtroom.

Q. Show us how you had Mr. Dye's hands in the air.

A. Like I did the other day.

Q. You had hold of him and —

A. I had hold of both of his hands. We were both backing up. That's when we went down to the ground.

Q. When did you first get hold of Mr. Dye?

A. About the corner of the barn. We wrestled from the corner of the barn.

Q. All the way up the hill?

A. Practically. Not quite. We didn't get quite up the hill.

Q. Did Mr. Dye run sideways up the hill?

A. I wasn't watching him get up the hill. I was out to get the gun. I couldn't tell you whether he run, trotted or walked. We both was moving. I couldn't tell you whether the man jumped or rolled down there. All I know I was out there to get this gun and keep my family protected.

Q. Now, this second shot, you are very positive, you are positive it was the second shot that hit you?

A. I can show you where the bullet went into right there.

Q. What feeling did you have at the time of the second shot at the corner of the barn that led you to believe that you had been hit?

A. When Cliff pulled his gun out and I told him to put that gun back in his pocket.

(622)

Q. What feeling did you have?

A. Like that.

Q. You could feel the bullet hit you?

A. I remember —

Q. Could you feel the bullet hit you?

A. I don't know if it was the bullet or the breeze of the other one going by. They was pretty close together.

Q. Could you feel the sting of the bullet?

A. I could feel nothing. I didn't have no pain until I got to the hospital in Flint. That's how scared I was. I wanted to get out of there.

Q. You are positive it was the second shot?

A. I say it was the second shot and no expert or nobody else would ever make me change my mind that it wasn't the second shot.

Q. Now, the first shot wasn't fired at you at all was it?

A. He pulled the gun out of his pocket when he went to load. It went off in the ground and he didn't stop and the second shot hit me in the stomach and he shot it again following that and missing me and I seen the fire coming out of the gun, missing my head about three or four feet.

Q. Did you feel that the gun was empty after the third shot?

A. Mr. Smith, that gun could have been loaded, emptied or anything. After the bullets started flying, Mr. Smith, I'll tell you what I really believed. Mr. Dye has a lake on his farm and I figured he was going to shoot us all.

MR. TAYLOR: Just a minute.

Q. Tell us what you believe.

A. I believe when Mr. Dye shot me that he had it all planned out. He is a smart man — to shoot me and to make it look like suicide and shoot my wife and kids and all. He wanted to get rid of us all. I fed them cows for a twenty thousand dollar sale. I built that place from scratch out there. Five years work in that place.

• • •

(623)

THE COURT: Mr. Clark — without shouting. We will have no more shouting. Quiet down and tell your story comfortably.

Q. You were in Court this morning when I asked Mr. Lodge about the pleadings in the civil suit were you not?

A. Yes, sir.

Q. You heard testimony that that he noticed some difference in you after May 7th?

A. Yes, sir.

Q. Have you consulted any doctor?

A. Mr. Smith, I ain't got the money much more than feed my kids without seeing a doctor after I lost everything I worked for.

Q. I think that's all.

MR. TAYLOR: That's all. Step down.

MR. TAYLOR: If the Court please, Mr. Hansard was subpoenaed and he has been here almost every day. We have been looking for him, calling him on the telephone. He is a very important witness. I called his home at noon and tried to get him at his place of employment. I will go ahead with another witness and if they do not appear, I'm going to ask the Court to adjourn until tomorrow morning at nine-thirty when we will have them here, but they are very important witnesses, but I can get rid of all our other witnesses except those two. • • •

• • •

BILLIE STRIFFOW, witness for the People, called on rebuttal, testified as follows:

DIRECT EXAMINATION
Conducted by Mr. Taylor:

(633)

Q. Your full name, sir?
A. Billie Striffow.
Q. Do you know the defendant here, Clifford B. Dye?
A. Only just from what I have seen of him. Just on the river down there. * * *.
Q. You say down on the river. Approximately when did this occur when you saw him on the river?
A. It was approximately three years ago I believe.
Q. Were you with anyone at that time?
A. Don Hansard.
Q. When you talk about the river, which river is that?
A. Shiawassee.
Q. Where is the Shiawassee River in relation to where Mr. Dye lives, if you know.
A. Well, it's probably a couple hundred yards from his house. I believe it runs through his property into a little lake there.
Q. What were you doing on that lake or river?

(634)

A. Fishing.
Q. You say that is when you saw Mr. Dye for the first time?
A. That's right.
Q. Did you have some conversation with Mr. Dye?
A. Very definitely so.
Q. Will you tell us what that was, sir?
MR. SMITH: Just a minute, if the Court please. I object to the question asking for a conversation with Mr. Dye down at the river three years ago. Counsel can state his purpose; perhaps identify the subject matter. It might be admissible although I doubt it. I imagine it is an at-

tempt to impeach Mr. Dye's testimony on an irrelevant and immaterial matter, collateral matter.

MR. TAYLOR: I might state my reason, my opening statement to the Jury, and we propose to show and do show on the occasion of August 26th that that was not the first time Mr. Dye had resorted to the use of guns and since it is connected with the case, it is material and relevant as to similar acts to show intent, plans, scheme, design, under section 28.1050. We contend it is most material.

MR. SMITH: If counsel is serious, it is one of the facts that he alleged in his opening statement and contends that it is a part of his case, then of course this witness could not be put on the stand because his name was not endorsed on the information and for the further reason if it had been, it would have been a part of his case in chief and not rebuttal.

(635)

MR. TAYLOR: If the Court please, the Cross Examination of Mr. Dye, he definitely stated that he was in fact not the aggressor; that this attack was made upon him and to rebut that fact and other facts to show that he on other occasions had been the aggressor, that it is proper rebuttal and it was not necessary for us to produce them in chief. • • •

MR. SMITH: If the Court please, counsel has now stated that Mr. Dye on Cross Examination denied that he, I don't know whether he said pointed the gun at somebody or something in that nature in connection with this affair. At least he was Cross-Examined on it and made a denial. Rebuttal testimony cannot be based in connection with a collateral matter upon any denial on the part of the respondent by reason of an answer, of a denial he made on Cross Examination. That makes a third reason why it is not admissible.

THE COURT: I believe it is to the discretion of the Court to permit the People to add witnesses, if there is no surprise or prejudice on the respondent. Under the circumstances, the Court will permit this witness to be added. • • •

(636)

MR. TAYLOR: • • • Our contention is that this witness has been called under proper rebuttal.

MR. SMITH: You are not asking to add him as a witness?

MR. TAYLOR: Until I have a ruling whether or not I can produce him as a rebuttal, I have no reason to make a motion as yet to add him as a witness.

THE COURT: In the discretion of the Court, the witness may testify. That is to say, from your point of view, Mr. Taylor, the Court will say that the witness might testify. Now, whether or not he should properly be added as a witness on your list of witnesses to be called or not, I suppose is a separate matter, but from the outline of testimony that you were to ask him, I would say that it fitted within the Statute as to what is proper testimony with relation to intent.

MR. TAYLOR: Then the question we come to now, that counsel is raising, if it is proper rebuttal and since I distinctly recall asking Mr. Dye whether or not he ever used a gun on people fishing on the lake and it was a denial, and while that goes to the credibility and that is relevant and material • • •.

(Jury left courtroom at this time).

• • •

(639)

(Jury returned to the courtroom at this time)

THE COURT: I will say to the Jury that while you were excused there was a discussion as to whether or not the man who had been called to the stand and sworn, should be permitted to testify. The Court ruled that his testimony would be competent if it followed the lines that Mr. Taylor had suggested, it would, but under our rules, if his name was permitted to be added as a witness for the People, then in all fairness to the respondent, I would have had to permit further rebuttal testimony on their part. That would have delayed this cause which is already in it-

seventh day, and in order to avoid the delay and expedite the trial, Mr. Taylor has agreed to withdraw the witness. Now, you should draw no conclusions from that other than the fact it has been done as a matter of expediency.

THE FOLLOWING TAKES PLACE WHILE LOIS C. CLARK IS RECALLED TO THE STAND AND TESTIFIED (RE-DIRECT BY MR. TAYLOR):

(647)

MR. TAYLOR: Not sufficiently identified by Mr. Dye. I'm sorry Your Honor. That also applies to exhibit 49. Now fifty is the check for $1676.00 which has been admitted. If it hasn't I will offer it at this time. • • •

MR. SMITH: No objection excepting the materiality of it.

CHARGE TO JURY

People of the State of Michigan vs.
Clifford Dye — No. 15576.
Charge: Assault with Intent to Murder.

MARCH 1, 1956.

(1) THE COURT: Members of the Jury: The attorneys in this case have brought to your attention all of the testimony and facts and circumstances available and you have listened attentively and with patience at the presentment of the proof and to the arguments of counsel. It is now my duty to charge you as to the law I believe to be applicable and it will then become your duty to deliberate and return a verdict.

(2) I think perhaps for just a moment I will depart from my prepared instructions and say to you that the Court is particularly pleased with the attention that you have given this case over a period of more than eight days. I

think the attention you exhibited is quite amazing. I think no one can complain because of any failure on the part of the Jury to show sincere interest. The case is important. The Court recognizes its importance along with you folks of the Jury and for that reason I prepared these instructions as to the law in writing. They have been prepared with some care and as I read them to you, if there is any doubt in your mind as to what I have read, I will be happy to stop and re-read if some point is missed, or in the event you get in the Jury room and would like to have them read again to you, you are perfectly welcome to call the officer and we will come back in and I can re-read the instructions to you because we want you to be informed as to the law.

(3) I think in fairness to Mr. Taylor and Mr. Smith, I should tell you that these instructions which I will read to you, have been prepared with their assistance, but the primary responsibility of course is on me to determine and finally what I believe the law to be. And so with that short introduction, I will proceed to read the applicable law to you as a charge.

(4) I charge you that you must give to this case that careful, intelligent and serious consideration which you as honest jurors of Oakland County consider it entitled to, unmoved and uninfluenced by anything that is akin to bias, prejudice or sympathy. Those things of course have no place in your deliberation. In committing this case to you, the Court desires to admonish you as to the important issues involved. The Court desires you to fully understand the responsibilities upon you of arriving at your verdict in this case. No more solemn or weighty duty can devolve upon a citizen of the State than to pass upon an issue involving the liberty of a fellow citizen. On the one hand you should remember then a failure to perform your duty by which a crime, if one is shown, might go unpunished, and the criminal escape the penalty of his crime, cannot be corrected by a new trial for the defendant cannot be twice put in jeopardy under our law. The State demands and has a right to ask at your hands the full performance of your duty in the enforcement of the law and no notions or

mere sympathy and sentimentality should cause you to hesitate in the full performance of that duty.

(5) On the other hand you should never for a moment forget your duty to secure and protect every right guaranteed by the Constitution and our law to the defendant. You should not allow any outside influence or pressure or indignation or sympathy to influence you in finding a verdict in this case. You should fairly, impartially and dispassionately examine the evidence in the case and after carefully and fully examining and considering it, render your verdict under the law and evidence, that full and complete justice may be rendered thereby between the State and the defendant.

(6) I charge you, members of the Jury, that you are the sole judges of the facts in this case. It is for you to weigh and evaluate the testimony given you in evidence, guided by the instructions of the Court. It is for you to say just what happened in this case, and how the thing complained of actually happened.

(7) I charge you in this connection that a person of sound mind and reason may not, under the laws of this State, maliciously or intentionally assault another with intent to murder, but I charge you further that before any person may be convicted of that crime, the People must prove to your satisfaction each and every element of the crime and unless all essential elements and ingredients are proved, it would be your duty to acquit.

(8) Now, as to the theory of this case from the People's standpoint, summarized of course because it has taken you more than eight days to listen, the People's theory is that Mr. Dye, acting as attorney for his sister, and Mr. Clark, the complaining witness, entered into a tenancy agreement some years ago; that the relationship continued on a friendly basis for a year or more and that only after the return of Mr. Dye from a visit out of the State in February of last year did disagreements begin to develop between Mr. Dye and Mr. Clark over the handling of the farm and the farm proceeds.

(9) Now, it is the further theory of the People that this difference between Clark and Dye in their thinking

was engendered and encouraged by Mr. Dye in order to get Mr. Clark off the farm and thus to get sole control of the farm and stock. Further, that this difference between the two parties led to the incident of May 7, 1955, and also led to subsequent and extended litigation.

(10) The People's theory is, and they have offered testimony, that during this period, Mr. Dye made threats of violence against Mr. Clark and finally that on the evening of August 26, 1955, Mr. Clark and his family, his wife and two children, went to the Dye farm to feed the stock. It is the People's theory that the trip was necessary and in routine and that Mr. Clark sought to avoid conversation; that the two parties, as you have listened to the testimony, saw each other near the barn. Clark sought to avoid any issues, discussion, argument, but that they did visit for a moment or two and that then and without justification, Mr. Dye pulled his gun from his pocket, fired one shot into the ground and that then Mr. Clark started to advance toward Mr. Dye. Two shots were then shot at Clark, one of which hit him and that a fourth shot was fired while Dye and Clark were grappling.

(11) Now, it is the theory of the People and testimony was produced, that Clark's approach, that is, Mr. Clark's approach was in an effort to protect his life and protect his family. The People further say that the gun was fully loaded, that the use of it was intentional, and that after the parties had separated, had ceased their grappling on the ground, Mr. Dye then went into the barn and obtained another weapon, for what purpose is not shown.

(12) Further, that in the scuffling, Mrs. Clark obtained the gun and that as soon as she got hold of the gun, the whole family, that is, Mr. Clark and his wife and the two children, hurried to their truck and as soon as they could get the gate open, started away but at that moment Mr. Dye, for some unexplained reason, moved his own car in what appeared to be an attempt to block the driveway. Now, that summarizes the People's theory of the facts surrounding this shooting.

(13) Now, on the other hand the respondent's theory varies somewhat. Conceded again that there was this farm

relationship, Mr. Dye representing his sister was the landlord, Mr. Clark the tenant. Mr. Dye says, testified that he knew of violence on the part of Clark in other instances; that Clark had made threats to him; that he himself had been attacked by Mr. Clark and he also told of what Mr. Clark had told him about some incidents that Clark had been involved in.

(14) As a consequence of what he had seen and heard, that he was in fear of his life; that because of this fear, he had tried by every legal means to settle the difficulties and that also because of this apprehension, that his life was in danger, Mr. Dye obtained a permit and that he carried a gun with that authority.

(15) It is the further theory of the respondent that Mr. Dye came to the farm that night about seven o'clock, talked with a client, changed his clothes and then went to the barn to do some routine chores. As he reached the northeast corner of the barn, for the first time in the barnyard saw Mr. Clark and started to talk with him. That almost at the moment that he started to talk with him, Mr. Clark started towards Mr. Dye; that Dye then pulled his gun out of his pocket and shot into the ground, shot intentionally but into the ground in an attempt to deter Mr. Clark from approaching him and therefore in self-defense; that he shot a second time, still in an attempt to deter Mr. Clark from approaching. Mr. Clark continued to come at him and they grappled and after the grappling, two more shots were fired.

(16) Now, it is the theory of Mr. Dye, the respondent, that it was the fourth shot that hit Mr. Clark and that that shot was discharged involuntarily and as the two of them hit the ground grappling, so that the respondent has two theories: First, that he shot two shots in self-defense — the first two in self-defense, and the last two involuntarily. It is Mr. Dye's further theory that immediately upon learning that he had shot Mr. Clark, he offered to take him to the hospital; that he did not go to the barn and get a weapon and that he did not block the driveway. Those are the factual positions of the People and of the respondent.

(17) The Statute creating this offense, so far as the

same is material, provides: That any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony. I will read that again. Any person who shall assault another with intent to commit the crime of murder shall be guilty of a felony.

(18) To constitute this offense, it must be shown that the respondent made an assault upon the complaining witness with an actual intent to kill, under such circumstances as would have made the killing murder had death resulted therefrom. An assault is defined as an attempt or offer, with force and violence, to do corporal hurt to another, coupled with a present ability to carry the intention into effect. Murder may be defined as where a person of sound memory and discretion wilfully and unlawfully kills any human being against the peace of this State with malice aforethought expressed or implied. It is the intent with which the injury is inflicted or attempted, that constitutes a material element of assault with the intent to commit murder. When such intent is shown, that which may have been only an assault, accompanied with the felonious intent, will be assault with the intent to commit murder when thus accompanied.

(19) Something has been said during the trial by the attorneys about the presumption of innocence and reasonable doubt. It is the rule of law in criminal cases that the respondent starts in the trial of the case with the presumption of innocence in his favor and this presumption continues throughout the course of the trial and until you have reached the jury room and have arrived at the conclusion that the people have proven their case and that the respondent is guilty beyond a reasonable doubt. The term reasonable doubt does not mean that the prosecution must prove the respondent guilty beyond any doubt whatsoever because if this were true, there could never be any conviction in a criminal case where the respondent did not plead guilty. So you will not be confused by what has been said and may more clearly understand the burden which rests upon the prosecution, I should try to give you a definition of the term reasonable doubt. A reasonable doubt is defined as a fair doubt. It is not a mere imaginary

possible or captious doubt but a fair doubt, based upon reason and common sense. It is such a doubt as may leave your minds after a careful consideration of all the testimony in the case, in that condition that you cannot say you have an abiding conviction to a moral certainty of the truth of the charge here made against the respondent.

(20) The respondent has been a witness before you, as he had a right to be. You have a right to weigh his testimony and give it such credit as you think it is fairly entitled to. You have a right to take into consideration, in weighing the testimony, his relation to the offense charged in the information. Under our modern Statutes in this State, one on trial for crime is allowed to testify under oath in his behalf. His interest in the result of the trial that would formerly preclude his testimony now has not that effect and it is the duty of the Jury, where this is done, to give his testimony such weight as in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His interest is to be considered only so far as it affects his credit. His testimony is to be scanned and treated the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of other witnesses. If inconsistent with established facts or his prior statements, you may treat it the same as you would that of any other witness whose testimony is thus defective. This case is not to be determined by the number of witnesses on either side. It is not the number of witnesses but the stories which they tell; the reasonableness of their stories; their consistency; their credibility and all the other considerations I have enumerated to you that should affect your verdict.

(21) Now, you Jurors are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony, and in determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and the appearance of the witness on the stand, the interest of the witness in testifying, his relation to or feeling for or against either party; the probability or improbability of his statements; the opportunity

he has had to observe and to be informed as to the matters respecting which he gives testimony, and his inclination to speak truthfully or otherwise as to the matters within his knowledge. All these matters being taken into account with all of the other facts and circumstances given in evidence, it is your province to give each witness such credit and the testimony of each witness such value and weight as you deem proper. If you find a witness falsifies his testimony in any one material respect, then it is within your province to disbelieve all that witness' testimony if it is not supported or corroborated by other testimony.

(22) The fact that the defendant has been arrested is no proof of his guilt and is not to be considered by you in your consideration of this case. The fact the defendant is accused of committing an offense should be given absolutely no weight by you in determining this case. The mere swearing out of a warrant or the arrest of the defendant is no evidence at all bearing upon his guilt. You must presume the defendant to be innocent until he is proven guilty beyond a reasonable doubt. This presumption of innocence attaches to the defendant from the outset, from the moment the charge is laid against him and it remains with him throughout the trial of the case and through your deliberation in the Jury room until the prosecution, by competent evidence, has removed that presumption and established the guilt of the defendant beyond a reasonable doubt.

There are three offenses embraced in this information of a lesser degree than assault with intent to commit murder, and it is necessary that they be defined because in the event that you find the defendant committed an assault as I have defined it, but without intent to commit murder, then it becomes necessary for you to consider these lesser offenses. The first lesser offense is assault with intent to do great bodily harm less than the crime of murder. This offense as the name implies is complete when a person makes an unjustifiable assault upon another with intent to inflict serious and permanent bodily injury less than murder.

(23) The next lesser offense is felonious assault. An assault is an attempt or offer with force and violence to do corporal hurt to another with a present ability to carry the intention into effect. The offense of felonious assault is complete if you are satisfied from the testimony that the respondent committed an intentional assault with a dangerous weapon upon the complaining witness. A dangerous weapon is one likely to produce death or great bodily injury or which may endanger life or inflict great bodily harm. The last offense in the order of its importance is assault and battery. If you are satisfied from the testimony that an assault was committed by the defendant without any of the intents referred to, which resulted in corporal hurt, however slight, to the complaining witness, then the defendant would be guilty of assault and battery.

(24) To summarize the different verdicts, I will say that there is any one of five verdicts which you may return in the case at the conclusion of your deliberations: 1. Guilty of assault with intent to commit murder; 2. Guilty of assault with intent to do great bodily harm less than the crime of murder; 3. Guilty of felonious assault; 4. Guilty of assault and battery; and 5. Not guilty.

(25) You are instructed, while the law requires, in order to constitute an assault with the intent to commit murder, that the assault with intent to murder must have been committed under such circumstances and with such premeditation and design as would have made the killing murder had death ensued. Still it does not require that the wilful intent, premeditation or deliberation shall have existed for any length of time before the crime was committed.

(26) It is sufficient, if there was a design and determination to kill distinctly formed in the respondent's mind at any moment before or at the time the assault was committed. The law presumes every person to intend the usual consequences which accompany the use and means employed in the manner employed. The intent to do an injury may be and usually is found from the acts of the accused. It is to be noted that all of the possible offenses involve the elements of an assault. An assault involves

I said this before, an attempt to do bodily hurt to another and stating the same proposition in the negative, I must charge you that there can be no assault as involved in any of the possible charges in this case unless the defendant intended to inflict corporal harm upon the complainant. As to what his intention actually was, you must determine that, if you are able to, from the evidence in the case, considering what he did, what he said and what he testified to as his intent.

(27) Motive is that which excites or stimulates to action. Motive is never an essential element in a crime. It is only material from the fact that it tends to show the state of mind when the act was committed. It is never necessary to show a bad motive to convict a man of a crime and on the other hand the best of motives will not exempt one from criminal responsibility for an alleged act wilfully committed. The fact that a criminal act is wilfully done with an innocent or laudable motive will not excuse it. When an act is defined by law to be illegal and criminal, every one is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances, without regard to his real motive and intention.

(28) Now, it is the theory or contention of the defendant that shots referred to as numbers one and two were fired by him intentionally but were not fired at the complainant but on the other hand were intentionally fired in such a manner as to be likely to deter the complainant from continuing to pursue the defendant and thus prevent serious bodily harm to the defendant from the hands of the complainant. This contention or theory on the part of the defendant creates an issue commonly known as self defense. A plea of self-defense is under certain circumstances a good defense. To make the plea available, it must appear that the respondent was without fault on his part. If he himself was the aggressor in the conflict, he cannot invoke the doctrine of self-defense as an excuse for the killing unless he was at that time in immediate danger of losing his own life or suffering some grievous bodily injury and there was no retreat open for him and his only

safety lay in striking the blow which caused the injury to Mr. Clark. Self-defense in proper cases is the right of every person but it will not justify the taking of a human life or the intent to take a human life and the jurors must be satisfied from the testimony first, that the defendant was not the aggressor in bringing on the difficulty. That is, that he was without fault. Two, that there existed at the time of the striking of the blow in his mind a present and impending necessity to strike such blow in order to save himself from death or some great bodily harm and third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus avoided the conflict. Unless you find that all three of these facts are established in this case, then the plea of self-defense fails.

(29) The burden of proof of all such matters is upon the People to show that the respondent is guilty of the offense charged and the People's testimony must be such as to satisfy the Jurors that the shooting was not done in self defense. The burden is not upon the defendant who makes the defense or self-defense to satisfy the Jury of the truth of his claim.

(30) Now the Court instructs the Jury that the only mode provided by our Constitution and Laws for deciding questions of fact in criminal cases is by a verdict of the Jury. In a large proportion of cases, and perhaps strictly speaking, in all cases absolute certainty cannot be attained or expected. Although the verdict to which a Juror agrees must of course be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with a candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided and that you were selected in the same manner and from the same source from which any future jury must be. There is no reason to suppose the case will ever be submitted to persons more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be pro-

duced on the one side or the other, and with this in view, it is your duty to decide the case, if you can conscientiously do so.

(31) In order to make a decision more practicable, the law imposes the burden of proof upon one party or the other in all cases. In the present case the burden of proof is upon the People to establish every part of it beyond a reasonable doubt and if in any part of it you are left in doubt, the defendant is entitled to the benefit of the doubt, if it is reasonable and must be acquitted, but in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments, and on the one hand, if much the larger number of your panel are for a conviction, a dissenting Juror should consider whether the doubt in his mind is a reasonable one which makes no impression upon the minds of so many equally honest, equally intelligent with himself, and who have heard the same evidence with the same attention with an equal desire to arrive at the truth, and under the sanction of the same oath.

(32) On the other hand if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

(33) Possibly this is the first Jury case in which some of you Jurors have served so it might be helpful if I were to say a final word about your verdict. The verdict in a criminal case is announced by the foreman of the jury who is usually selected by the jurors when they retire for their self-deliberation, so you may find it helpful to first select your foreman.

(34) There are, and this is by way of repetition, there are one of five verdicts which you can return at the conclusion of your deliberation. I urge you to be careful about this. There are one of five verdicts which you can return at the conclusion of your deliberation, depending upon your conclusions as to the evidence under the instructions

of the Court, that is to say, these are the five verdicts: Guilty of assault with intent to commit murder; guilty of assault to do great bodily harm less than the crime of murder; guilty of felonious assault; guilty of assault and battery; or not guilty. One of those verdicts must be announced by your foreman when you have completed your deliberation.

I think that completes the trial of this cause and you may retire for your deliberation.

AFFIDAVIT OF CLIFFORD B. DYE

STATE OF MICHIGAN

SS.

COUNTY OF GENESEE

The affiant, Clifford B. Dye, being first duly sworn, deposes and swears as follows, to-wit:

That he is the respondent and appellant in the above entitled cause;

That he makes this affidavit in support of the respondent's claim of erroneous conduct by the Assistant Prosecutor in injecting improper and inflammatory insinuations into the trial of said cause;

That apparently through inadvertence the People's closing argument to the jury was not caused to be recorded by the court reporter;

That the said argument was made by George F. Taylor, Assistant Prosecutor, who during said argument included references to the following matters:

The alleged plural wives of the respondent and the fact that "Mr. Clark came down to Dye's place that night with his only wife";

The alleged conduct of the respondent in allegedly putting "every nickel's worth of his property" in the name of his sister, to put it out of reach of "the Clarks and the creditors";

That the respondent allegedly "wanted the Clarks off their farm so he could get all those cattle and the entire

milk check, after it got up to $1,000.00 a month, * * * he wanted the entire benefits of all the Clark's investment and work"; "he got the farm and the cattle and the Clarks are in debt";

That "lawyer Dye fooled us when he got that gun permit and he fooled us when he got that assault and battery warrant for Mr. Clark", and "Mr. Clark was tried and found not guilty by a jury just like you";

The alleged practice of the respondent in "always taking a gun when he wants his way * * * just like he took a loaded gun when he went out in his yard that night";

That until this trial, "after Dye had six months to think it over is the first time he has told me or any law enforcement officer one thing about what happened that night * * * he wouldn't even tell us the time of day";

That the quotes in the foregoing are intended to indicate substantially verbatim quotes from the language of the Assistant Prosecutor in his said argument.

That after the Assistant Prosecutor withdrew People's proposed witnesses Billie Striffow and Don Hankard, upon the respondent's objection to their testifying, the Assistant Prosecutor seated said witnesses beside the prosecuting witness and his wife inside the court room railing, in the chairs reserved for attorneys and trial participating litigants, within 8 or 10 feet of the front of the jury box, where they remained with the prosecuting witness in full view of the jury until the conclusion of the trial; that as far as the affiant could observe or is advised there was no legitimate purpose or reason for so exhibiting said witnesses and the prosecuting witness together in such close proximity to the jury.

Clifford B. Dye,
Affiant.

Subscribed and sworn to before me by Clifford B. Dye, this 18th day of November, 1957.

H. D. Gordon,
Notary Public, Genesee County, Michigan.
My commission expires: Nov. 1, 1961.

AFFIDAVIT OF CLARENCE L. SMITH

STATE OF MICHIGAN

SS.

COUNTY OF OAKLAND

The affiant, Clarence L. Smith, being first duly sworn, deposes and swears as follows, to-wit:

That he represented Clifford B. Dye, the defendant and appellant above named, as trial attorney in the trial of the above cause in the Circuit Court for Oakland County;

That he was present and heard George F. Taylor, Assistant Prosecuting Attorney for Oakland County, make the Peoples' closing argument in said cause;

That although more than two years have passed and he does not recall every subject touched upon in said argument, he does have a distinct recollection of hearing said Assistant Prosecuting Attorney make the following statements to the jury in said closing argument:

> "Mr. Clark went down to Dye's place with his only wife".
>
> "He (Dye) fooled us when he got that gun permit and he fooled us when he got that warrant for Mr. Clark".

The affiant further states that if there was any variation from the said exact words it would be extremely slight and would not change the substance of the said statements.

Clarence L. Smith,
Affiant.

Subscribed and sworn to before me by Clarence L. Smith, this 14th day of August, A.D. 1958.

Virginia Talmage,
Notary Public, Oakland County, Mich.
My commission expires Sept. 17, 1961.

AFFIDAVIT OF DONALD J. BREMER

STATE OF MICHIGAN

SS.

COUNTY OF OAKLAND

The affiant, Donald J. Bremer, being first duly sworn, deposes and says:

That he is a practicing attorney, and Justice of the Peace in and for the Township of Holly, Oakland County, Michigan;

That he was present in the Circuit Court when George F. Taylor, Assistant Prosecuting Attorney for Oakland County, made the Peoples' closing argument in the above entitled cause and heard him make the following statements therein:

He stated that "lawyer Dye left Harvey's Lodge's office that night (the night of the trouble) in a towering rage and drove home at seventy miles per hour to get Bill Clark".

He stated that "lawyer Dye fooled us when he got that gun permit and he fooled us when he got that warrant for Mr. Clark on that assault and battery charge" and that "Mr. Clark was tried and found not guilty".

He stated that "Mr. Clark went down to lawyer Dye's' place with his only wife".

Affiant further states that although approximately two and one-half years have passed since said trial, he has a distinct recollection of the above remarks having been made and that the same are, substantially, verbatim quotations.

Donald J. Bremer,
Affiant.

Subscribed and sworn to before me by Donald J. Bremer this 4th day of September, A.D. 1958.

D. S. Coleman,
Notary Public, Oakland County, Mich.
My commission expires June 24, 1962.

MAJORITY OPINION

BEFORE THE ENTIRE BENCH

VOELKER, J.

On August 26, 1955, defendant-appellant Clifford B. Dye allegedly assaulted one William Clark with a dangerous weapon, to wit: a 25 caliber semi-automatic pistol. At the time of the claimed assault 4 shots were fired, one of which struck and lodged in Clark's abdominal area. Defendant Dye, a practicing lawyer in Fenton, Michigan, was charged with assault with intent to commit the crime of murder and convicted of the lesser included offense of assault with intent to do great bodily harm less than the crime of murder. Upon leave granted he has appealed.

Defendant and complainant first became acquainted about 2 years before the alleged assault, when Clark retained defendant to represent him in a legal matter. Shortly thereafter the two entered a farm tenancy relationship, wherein Clark as tenant leased a farm controlled by defendant as attorney in fact for his sister, who lived in Kentucky. Thereunder Clark acquired pasturage and other use of certain adjoining farm lands (also owned by the sister), including the property upon which defendant was living and upon which the alleged assault occurred. The agreement was that Clark was to develop a dairy farm and that the parties were to divide the expenses and profits.

In the beginning it appears that all went well, but as time went on and profits increased the friendly relationship cooled. Finally at almost every meeting the parties had heated arguments, at least one of which resulted in physical violence for which complainant Clark was accused, tried and acquitted of assault and battery. At the present trial Clark claimed that the cause of their trouble was the defendant's desire to oust him from the farm (which farm Clark claims was in reality owned by the defendant and put in his sister's name to avoid the claims of creditors and various of his former wives) and that to accomplish his purpose the defendant commenced a campaign of harassment, including the service of many legal papers,

threats of extensive litigation if Clark retained an attorney, a suit in equity for an accounting, and the cutting off of Clark's income by withholding the farm's milk checks. Defendant denies this and claims that the sole cause of the friction was Clark's violent nature.

On the day of the shooting Clark had driven his truck through defendant's farm so as to do his farm chores, as he had done regularly in the past. His wife and children accompanied him, the latter remaining in the truck, while Clark advanced to the barn. The wife, who testified at the trial, later followed her husband and witnessed most of what transpired. From this point the stories are so conflicting that they cannot possibly be reconciled.

In a nutshell it is complainant Clark's story that after he and defendant first confronted each other on the latter's farm at some distance (18 or more feet) that defendant produced a pistol from his person, brandished it in complainant's direction, and fired into the ground; that Clark, whose wife and children were in the near background, determined to close in and disarm the defendant so as to protect his family and himself; that while they were still some distance apart defendant fired 2 more shots, one of which hit and lodged in Clark's abdominal area; that in the ensuing struggle for the gun, after Clark closed in, still another shot was fired, which hit no one.

Appellant flatly disagreed with this version and testified that at all times Clark was the sole aggressor; that he, the defendant, retreated as soon as he saw Clark; that there was a violent exchange of words and that Clark began to pursue him; that defendant was in mortal fear of his life because of Clark's alleged violent nature and the previous trouble between them, so he drew his pistol from his pocket and shot into the ground hoping to prevent Clark from chasing him further. Defendant claims further that he, an older man, retreated as fast and as far as he was able; that Clark pursued and overtook him and grappled for the gun, cursing and threatening to use it to kill the appellant, and that somehow in the melee the gun was discharged, injuring Clark. In other words, the de-

fendant's defense is one of self-defense plus a claim that in any event the shooting which wounded Clark was accidental.

Appellant's first and fifth questions on appeal are:

"I.

"(a) Did the Court err in failing to direct a verdict of not guilty?

"(b) Did the Court err in submitting to the jury the charges of assault with intent to murder, assault with intent to do great bodily harm, felonious assault and assault and battery?

"(c) Was the verdict against the great weight of the evidence? * * *

"V.

"Should the Respondent's motion for a new trial have been granted?"

There is accordingly much discussion in the briefs on both sides regarding appellant's claim of self-defense and the related subject of his need to retreat when he was, as he claims, "in his own backyard." In this connection much is sought to be made of the fact that an expert witness for the people testified that he found powder burns on complainant's clothing thus showing, as appellant claims, that Clark was shot at close range, and further showing, as appellant also claims, that he had indeed retreated and was pursued and overtaken by the homicidal Clark, whereupon, during the ensuing struggle, the gun was accidently discharged.

On this score we need only point out that the expert witness did not say Clark was *shot* at close range, but merely that one or more shots appear to have been *fired* at close range, which was not seriously disputed by anyone. As for the disputed claim of self-defense, retreat, and all the rest — the jury heard the conflicting stories and apparently took more stock in Clark's version than in the

defendant's. We see no reason to change the result. We also observe that if complainant's story was believed (that he was first shot at by defendant at some distance and before he, Clark, had made any move toward the defendant hostile or otherwise), subsequent claimed retreat and acts of self-defense by defendant would be irrelevant.

In essence then, appellant seeks to question the sufficiency of the people's evidence. Defendant is not entitled to a redetermination of the facts in this Court; they were settled by the jury and we will not go into their determination so long as there was sufficient evidence presented from which the jury might have found the defendant guilty beyond a reasonable doubt. We think there was.

We are not happy to note that because of the extreme self-serving nature of the briefs and appendices presented here on both sides, we found it necessary, in order to get a fair picture of the evidence, to make a careful study of the entire trial transcript, no easy chore. The transcript not only contained sufficient testimony, if believed, to support the verdict, but also to sustain the court's refusal to direct a verdict of not guilty and also to sustain the court's instructions regarding the 4 different categories of assault. Under the information filed and evidence presented in this case we believe the jury was warranted in convicting for the offense for which it found defendant guilty.

Appellant's second question is:

"II.

"(a) Was the conduct of the Assistant Prosecuting Attorney unfair, improper and prejudicial so as to constitute reversible error?

"(b) Did the Court err in failing to hold the Assistant Prosecuting Attorney in check in the matters referred to in question (a)?

"(c) Did the Court err in overruling the Respondent's several objections to the matters referred to in question (a)?

"(d) Did the Court err in overruling the Respondent's request that a mistrial be declared?"

Defendant claims support for the above contentions by alleging that the court erred in allowing the prosecutor by direct and cross-examination to bring out and refer to certain allegedly irrelevant and collateral matters pertaining to the defendant's varied marital life, his ownership of property, his professional experience and training, and numerous other things. From our study of the trial transcript we are of the opinion that in so doing the prosecutor was in good faith attempting to show a motive for the crime and to attack the credibility and show the possible bias of the defendant and certain of his witnesses. Although there is much in the transcript that might well have been omitted, we do not feel that the uncalled for matter in any way prejudiced the rights of the defendant. In this area the trial court necessarily possesses a broad discretion, and unless that discretion is abused this Court will not interfere. We find no such abuse. (See, generally, 1 Gillespie, Michigan Criminal Law and Procedure (2d ed.), Sec. 400, 401 and cases cited therein).

Appellant's third question is:

"Did the Court err in refusing to permit the Respondent, under the claim of self defense, to recite in evidence knowledge received by him from third parties, prior to the alleged assault, of incidents of violence and brutality on the part of the Prosecuting Witness (Clark)?"

For purposes of this opinion we will assume, without deciding, that the court did err in not admitting the proffered testimony. That leaves the question of whether or not that error, in light of the other testimony presented, was prejudicial to defendant's cause. To so determine we must look at the surrounding facts.

Defendant by the forbidden testimony sought to show a fearful state of mind, so as to substantiate his claim of self-defense. We glean from our study of the transcript of the testimony that appellant was allowed to testify to many other claimed violent acts by the complainant, some that the complainant himself had allegedly told defendant about, and others within defendant's own knowledge. He

was then allowed to give the names of the several people who had allegedly told him of still other violent acts committed by the complainant. By so doing we think he adequately got across his idea, that is, that he feared the complainant because of his tendency toward violence. Any further testimony that he may have given on the subject, although possibly relevant, would have been merely cumulative. Thus, although it may technically have been error to reject the proffered testimony, we think that in the light of the other evidence presented that error, if any, was rendered harmless. Our holding is not weakened by the fact, already noted, that the evidence indicated the offense here may have been completed before the complainant ever made any move toward defendant, hostile or otherwise.

Appellant further claims that the court erred in its charge to the jury. To sustain that allegation he has extracted several short excerpts from the entire context of the charge and discussed their claimed inadequacies at great length. Jury instructions in a criminal case, however, as well as in civil cases, must be read in their entirety. So tested we find these instructions (which were carefully prepared with the cooperation of counsel on both sides and read to the jury), were quite adequate to the comparatively simple issues in the case.

Affirmed.

Talbot Smith
Eugene F. Black
George Edwards
Thomas M. Kavanagh

Concurred with VOELKER, J.

MINORITY OPINION

BEFORE THE ENTIRE BENCH.

KELLY, J.

Justice Voelker, considering appellant's claim that the conduct of the assistant prosecuting attorney was "unfair, improper and prejudicial so as to constitute reversible error, found that: "Although there is much in the transcript that might well have been ommitted, we do not feel that the uncalled for matter in any way prejudiced the rights of the defendant." I do not agree with that conclusion and, hence, this dissent.

The defendant, 54 years of age at time of trial, had, for some time before the day of the shooting, complained of heart trouble and this fact was known to the complainant.

Complainant was a young man of 27 years of age, over six feet in height, and possessed a pugnacious nature. His belief that he had a right to express his dislike by physical force is clearly established by his testimony, and this fact was known to defendant.

Defendant testified that on May 7, 1955, he was assaulted and choked by complainant; that the State Police were called and, after they had interrogated him, he heard the State Police advise the prosecutor, over the telephone, that they observed the marks of choking on defendant's throat. This testimony was neither refuted nor denied by State Police testimony.

On May 11, 1955, defendant started an action for accounting in the Oakland circuit court to determine his rights in a rent dispute with complainant, and obtained an injunction restraining complainant from molesting him. The shooting occurred in the early evening (August 26, 1955) and just a few hours before, in the afternoon, defendant had driven from his farm to the office of complainant's attorney and had had a conference with him. Complainant's attorney testified that he telephoned complainant's wife and informed her of that conference. Shortly after this telephone conversation, complainant and his

wife drove to defendant's farm, where the shooting occurred.

There were three witnesses to the shooting, namely: Complaining witness, his wife, and defendant. Their testimony as to what occurred at the time and place of the shooting follows.

Complainant testified that the shot which hit him was fired by defendant when he was 18 feet from defendant and was not fired while he was wrestling with defendant. Complainant testified on re-direct examination:

"Mr. Dye reached his hand in his pocket and pulled out a gun and was playing with it or something and it went off in the ground. * * * He pulled the gun out and hit me in the stomach — 18 feet apart. The next time he shot, the gun, he missed me by not over three feet. At that time I realized he meant business. My wife and children were crying. I was out. I had the bullet. I figured if I got the gun, the rest of the jury and people could take care of him. I didn't know if I was going to live or die at that time. I kept moving. I didn't drop. Blood kept coming out of my mouth. My main idea was to get in my pick-up and get out of there and I tried to do so. * * *

"Q. Did you have any conversation with anyone, Dye, or your wife or anyone else at that time?

"A. Mr. Taylor, blood was coming from my mouth and the main thing I wanted was my wife to get the gun."

On cross-examination, complainant testified:

"Q. Mr. Clark, I will show you People's Exhibit 7 and ask you whether or not you recognize the man appearing in that picture as depicting a position where you and Mr. Dye fell on the ground outside the gate between the gate and Dye's house?

"A. Somewhere right around there, Mr. Smith, or a little bit this way. In the barnyard your gate is open a little too far now. The gate was open just enough for Mr. Dye to slide into.

"Q. Did you have a hold of Mr. Dye at the time he went down?

"A. When he fell to the ground?

"Q. Yes?

"A. Yes, I was trying to get that gun.

"Q. How did you have hold of him?

"A. I had hold of his arms.

"Q. At the time he fell were you two men facing one another?

"A. Yes, sir. • • • He had his hands up — by that time I had his hands up like this here. We went down together. We got tangled with the gate.

"Q. You had hold of his wrists and as Mr. Dye fell, you fell on top of him or at the side of him, something of that nature?

"A. Yes, sir.

"Q. Was the gun discharged at that time?

"A. No, sir. I couldn't say if it was. • • • When we was getting through that gate we got tangled up in the gate.

"Q. What happened then?

"A. We just went to the ground and Cliff was trying to get hold of the gun all the time. I finally got his arms up where I thought I could hold him until I got a few pains and I figured I was shot and I figured the best thing was to get out of there. • • •

"Q. How close were you to Mr. Dye when the last shot was fired?

"A. Well, I say between 15 and 18 feet. • • •

"Q. Did you tussle with Mr. Dye up the hill towards this gate?

"A. I guess we had to. I don't remember. I don't just recall what I did. I know I had hold of him and my wife picked the gun up.

"Q. How many shots were fired?

"A. I could count three. I know of three of them. I couldn't say if there was any more or there wasn't."

Defendant testified that the shot that hit complainant was accidently fired while he was on the ground and while complaining witness was on top of him. On cross-examination he said:

"As he started to run toward me, after the conversation I just related on the north side of the barn when I said to let me alone, I fired a shot. I started to run. I was running sidewise and I fired a shot in front of his feet on the ground, at the ground. I continued running and so did he. He didn't even hesitate. • • •

"Q. Pardon me. I'm sorry to keep interrupting you. I'd like to know the best judgment as to the position you were in at that time?

"A. I would say at that time I would be perhaps on. I would say I would be a little bit past that window that is on the north side that shows in that picture that we had there. I would be a little west of that.

"Q. So we don't have to get the picture, where would that be, what portion of the length of the side of the barn?

"A. That would be I would say I was perhaps two-thirds. I'd say I was at least two-thirds of the way to the gate from the corner of the barn.

"Q. Then what happened?

"A. Then I wheeled through the gate and I couldn't run any further. I stopped and as I spun through the gate I had to force it out. It isn't to open that way but I did. I whirled with the gate. As I did I was facing him as he came running. I said 'Don't come Bill; don't come, Bill. Let me alone.' I fired another shot hoping to frighten him.

"Q. Where did you direct that shot?

"A. Down. I didn't point the gun at him. I pointed it down in front of his feet as he ran.

"Q. And you fired that shot deliberately, too?

"A. Yes.

"Q. Then what happened?

"A. Just as he got, he stopped just a second then after he run on a piece and then he says, he called me a vile name which I wouldn't want to repeat here and he says 'I'll make you eat that G.D. pop gun you s.o.b. you.'

"Q. Now, at the time of the first shot, what is your best judgment as to the distance between you two men?

"A. At the time of the first shot I would say he was perhaps oh, 20 feet from me. At least 20 feet.

"Q. At the time of the second shot how far were you apart?

"A. I would say, oh, perhaps 10 feet.

"Q. Now, you have just related that you got through the gate and he uttered some oaths and said he would do something?

"A. Yes.

"Q. Where was he at that time?

"A. He just — he was just about to come through the gate.

"Q. Tell us what happened?

"A. • • • He shouted to her first. He shouted 'Lois, get around here where you can see this. Get around here where you can see this' and then he closed in on me and he grabbed my hand, that had the gun in it, in both of his hands and he took that and he squeezed my hand and turned it back toward my face. 'Pull, God damn you. Pull it, God damn you' and the gun went off and I managed with the other hand to get it to go off away from my face. It went off somewhere into the air.

"Q. Then what happened?

"A. Then I of course realizing that he was going to truly make me 'eat that pop gun' as he called it, namely, he was going to kill me, and I made an awful wrench and at the same time he threw me and tripped me like and I went backwards right on my back and I hit the ground awfully hard with him coming right after me and as I hit the ground the gun went off again and just a split second, my thought was to get that out of his reach, I threw it back over my head aways back up the hill. I never saw the gun again. He hollered just when the last shot went off, he hollered 'You shot me, you s.o.b. You shot me' and I saw a little piece of blood appear on his shirt here somewhere along in here and I saw he was shot and I said 'I'll take you to the hospital Bill, if you let me up. I'll take you to the hospital, if you let me up.' He says,

'No, B.G.', he took the Lord's name in vain, 'I'm going to lay right on you here and die, G.D. you, you s.o.b. you' and with that he commenced shouting loudly, 'Lois, get around here. Hand me the gun. Hand me the gun.' I couldn't see her but finally he started saying 'Pick it up, There it is. There it is' and he'd lean over me and saying 'There it is. Can't you see it? Hand it here.'

"Q. Go ahead. What happened?

"A. He said 'I'm going to kill the chicken s.o.b. right, just where I want him,' and he said 'Wait,' and he flung some kind of a rag to her, * * * 'Pick it up with this and hand it here.' * * * And then he started looking over in the direction of my automobile which was between where we were and the truck and the children and he says 'Give it here' and he kept calling louder and finally he got up off of me. 'Bring that gun.' When he got up off me, he just give me this by the throat and my shirt and he got up off of me and I raised up and I could see him kind of going real fast, walking fast past the end of my car out towards the truck, hollering 'Give it here, give it here I said."

Complainant's wife testified that the last shot fired was after her husband had grabbed defendant and in the struggle both her husband and defendant fell to the ground. She testified that defendant fired the first shot into the ground; that after this first shot her husband started approaching defendant. At the hearing before the justice of the peace, she testified that defendant was retreating, running sideways, but changed her testimony at the hearing by saying he was retreating backing up. She testified defendant shot the second time when her husband was 15 to 18 feet away from him; that the third shot was fired when her husband was going toward defendant; that finally he got hold of defendant and in tussling they fell to the ground, at which time she heard the fourth shot. She further testified that her husband asked her to get the gun, but she doesn't remember whether the gun was on the ground or whether she kicked it out of defendant's hand.

On the question whether the complainant's version that

he was shot while 18 feet away from defendant, or defendant's version that the shot was fired after complainant had seized him and threw him to the ground, we have the all important testimony of Wallace L. VanStratt, ballistic expert of the Michigan State Police. Justice Voelker's only comment on his testimony is as follows:

"There is accordingly much discussion in the briefs on both sides regarding appellant's claim of self-defense and the related subject of his need to retreat when he was, as he claims, 'in his own backyard.' In this connection much is sought to be made of the fact that an expert witness for the people testified that he found powder burns on complainant's clothing — thus showing, as appellant claims, that Clark was shot at close range, and further showing, as appellant also claims, that he had indeed retreated and was pursued and overtaken by the homicidal Clark, whereupon, during the ensuing struggle, the gun was accidently discharged.

"On this score we need only point out that the expert witness did not say Clark was *shot* at close range, but merely that one or more shots appear to have been *fired* at close range, which was not seriously disputed by anyone." (Emphasis supplied).

Complaining witness Clark was shot only once, and the bullet entered the stomach area. There is no dispute that in close proximity to the point where the bullet entered Clark's body there were powder burns. No other testimony was offered in regard to powder burns, and because of the importance of this testimony, which was not contradicted, impeached or challenged, showing that the bullet which wounded complainant was shot from a gun not more than 18 inches from complainant's body, we set forth the testimony of State Police VanStratt:

"This was delivered to me at our State Police laboratory on August 31, 1955, by Detective Barkell. He requested that I test an area of this shirt to determine whether or not any powder burns or powder particles from a fired cartridge were present on the shirt. * * *

"Q. Did you make a further determination to find any evidence of powder burns?

"A. I did.

"Q. And you so found powder burns did you not?

"A. I did.

"Q. And the area on that particular piece of apparel, does it in any way correlate with the place on the abdomen where you pointed the gun when we made this demonstration?

"A. I would say yes. • • • •

"Q. I am referring now to People's Exhibit 5 which has been offered in evidence here and for a better understanding, the testimony shows that someone said that the parties standing there were in the same relationship as to distance as Mr. Dye was to Mr. Clark at the time there was an explosion. Would you say from that particular photograph that it would even be possible or remotely possible for powder burns to appear, on the undershirt, of a gun of this caliber, fired at that distance?

"A. No, sir, I do not believe so. • • •

"Q. In other words, if it could happen, it would be an unusual exception, isn't that true?

"A. I would say it would be impossible to happen."

On cross-examination this witness was questioned as to the distance of the gun from the body at the time it went off.

"Q. In this particular case, and I don't care what you say in this particular case, what is your best judgment as to the distance that gun was from the body or the shirt at the time it went off?

"A. It is my opinion that the gun was held no closer that one foot but at least as close as 18 inches, approximately the 18 inch distance. • • •

"Q. What would that determining factor be?

"A. The degree of powder that I found around the bullet hole."

Defendant pled self-defense and the burden of proof was upon the State to prove that it was not self-defense. A grave and serious question as to whether the State had met this test was presented to the jury for determination. Under these conditions, the duty rested squarely on the State to guard against prejudicial remarks and questions, or the introduction of improper collateral evidence. This duty was not met and, on the contrary, the record discloses that every effort by collateral attack and improper questions was made by the State to discredit and belittle the defendant.

The State endeavored to bring before the jury the fact that defendant had been married five times. Before defendant took the stand, the State elicited from complainant's wife the fact that defendant had domestic troubles and had been married several times. When objections were made the Court ruled that such testimony was improper, but this did not deter the State from asking defendant, "Isn't it a fact, Mr. Dye, that you have been married five times?"

The prosecuting attorney endeavored to prove by complainant's wife that defendant had asked her to forge his wife's name to a milk check, and followed this up by a series of questions that could only be considered by the jury as the State's contention that defendant was a man who placed all his property in others' names for the purpose of defrauding creditors and evading income tax.

Defendant was a justice of the peace in Kentucky before seeking and securing permission to practice law in this State. The State questioned the defendant as to the years he was a justice of the peace and the number of criminal cases he had conducted, and then brought to the stand Donald F. Winters, Clerk of the Supreme Court, to prove that at the time defendant made application for admission to the Michigan bar he made different answers. While the defendant denied the fact placed in the jurors' minds that the State considered defendant a man who held himself above and beyond the law, the State raised the point by asking him if he was not known in Kentucky as "I am the law Dye."

The State endeavored to prove that defendant might have a criminal record and was insane, by the prosecutor questioning him and holding up a paper in his hand which purported to be an application for a permit to carry a gun in Oakland county. The prosecutor referred to the fact that the question in regard to whether he had ever been convicted, or was insane, had not been answered. The prosecutor then asked questions that could only mean that the prosecutor had a right to conclude that failure to answer these questions was because defendant had been convicted and was insane.

The above are only a few of many calculated and definite efforts to discredit defendant through collateral attack.

While we realize the difficult case the prosecutor was confronted with, we quote with approval the following from People vs. Lieska, 161 Mich. 630, 638:

"Zeal in the prosecuting attorney is entitled to the highest commendation, but it must be exercised within proper limits. Witnesses are entitled to respectful consideration, and it is the duty of the courts to see that they are protected from the insinuations and attacks of counsel. Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and nonpartisan, and insinuations, thrown out by him regarding the credibility of witnesses for the defense, are calculated to prejudice the respondent. As was said in *People vs. Cahoon* (88 Mich. 456), *supra*, these questions and insinuations reflected upon the character of the witnesses. The prosecuting attorney has no right to discredit the witness by innuendo. * * *

"We are constrained to say that the respondent did not have that fair and impartial trial which the Constitution and laws of this State guarantee him."

The prosecutor's duty to guard against questions which tend to create prejudice in the minds of the jury was established by this Court in People vs. Kalsey, 303 Mich. 715, 718, as follows:

"The prosecutor contends that the aforementioned cross-examination was for the purpose of testing the memory

and credibility of the defendant. We think, however, that the interrogation went far beyond the boundaries of permissible cross-examination. Such an examination could have been for no other purpose than to create prejudice in the minds of the jurors. The tactics pursued have been previously condemned in *People vs. Gotshall*, 123 Mich. 474; *People v. Dowell*, 136 Mich. 306; and *People v. Wright*, 294 Mich. 20. Appellee contends, however, that complaint of the cross-examination cannot be made now because no objection was interposed thereto in the trial court. Ordinarily, this is true, yet, as here, where serious error has been committed, this court should take cognizance of such error under our supervisory powers although no objection was made in the trial court. *People vs. Holmes*, 292 Mich. 212. For this reason, the case must be reversed and a new trial granted."

Many questions were asked that did not pertain to the facts surrounding the shooting, but were directed toward defendant's past life. These questions did not refer to a criminal record, but portrayed defendant as a man whom the average juror would not respect, or like. While defendant denied these collateral insinuations, we realize that jurors are prone to accept the facts as set forth in the prosecutor's questions rather than the defendant's denials.

We agree with defendant's statement "that the respondent was prevented from having a fair trial because of the injection of prejudicial innuendo and evidence concerning irrelevant, incompetent, immaterial and collateral matters that were prejudicial to the respondent that included remarks in the People's opening statement and continued throughout the trial and in the final argument."

The verdict of guilty is set aside and the case is remanded for a new trial to be held without improper evidence or prejudicial conduct or remarks.

Reversed and remanded.

John R. Dethmers
Leland W. Carr

Concurred with KELLY, J.

COPY OF JOURNAL ENTRY

At a general term of the Circuit Court continued and held in the Court House in the City of Pontiac, County of Oakland, State of Michigan, on Thursday the 1st day of March in the year of our Lord Nineteen Hundred and fifty-six.

PRESENT: Hon. Clark J. Adams, Circuit Judge.

Court opened for business in due form.

15576 People of the State of Michigan

vs.

Clifford Dye

The prosecuting attorney and the respondent with his counsel being in court ready for trial, thereupon came the jury heretofore impaneled and sworn to well and truly try the issue joined between the People of this state and the prisoner at the bar, whom they shall have in charge, and, unless discharged by the court, a true verdict give therein according to evidence and laws of this state, who sat together and heard arguments of counsel and charge of the court, and retired from the bar thereof to consider their verdict to be given, in charge of officers of this court, and, having been absent for a time, returned into court and do say upon their oaths that said respondent it guilty of the crime of ASSAULT W INTENT TO DO GREAT BODILY HARM LESS THAN MURDER, as the people have in their information in this cause charged, whereupon it is ordered that said jurors be discharged from further consideration of the case. It is further ordered that bond be continued and sentence deferred until March 12, 1956.

Read, approved and signed in open court, whereupon court adjourned until March 2, 1956.

(s) Clark J. Adams,
Circuit Judge.

Countersigned:

(s) Louis E. Fairbrother,
Deputy Clerk.

CERTIFICATE OF COPY OF RECORD BY COUNTY CLERK — In Chancery. 168

STATE OF MICHIGAN
SS.
COUNTY OF OAKLAND

I, Daniel T. Murphy, Jr., Clerk of the Circuit Court for the County of Oakland, in Chancery, the same being a Court of Record and having a seal, do hereby certify that I have compared the annexed copy of CR 15576 Clifford Dye Copy of Journal Entry dated March 1, 1956 with the original record thereof now remaining in my office, and that it is a true and correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Pontiac this 10th day of September, 1959.

Daniel T. Murphy, Jr.,
Clerk.
By Margaret A. Mitchell,
(SEAL) Deputy Clerk.

COPY OF JOURNAL ENTRY

At a general term of the Circuit Court continued and held in the Court House in the City of Pontiac, County of Oakland, State of Michigan, on the 19th day of March in the year of our Lord Nineteen Hundred and fifty-six.

PRESENT: Hon. Clark J. Adams, Circuit Judge.

Court opened for business in due form.

15576 People of The State of Michigan
vs.
Clifford Dye

The respondent having been upon a verdict of the jury duly convicted of the crime of assault with intent to do great bodily harm less than murder, as more fully appears

by the records and files thereof, and having been brought before the court for sentence, and having been asked if he had anything to say why sentence should not be pronounced upon him, whereupon said respondent expressed his opinion to the court;

It is therefore ordered and adjudged that said respondent be confined in the State Prison for Southern Michigan, under the provisions of the Criminal Code, and, the amendments thereto, for a minimum term of two (2) years and a maximum term of not to exceed ten (10) years.

On motion of the attorney for the respondent for a stay of execution of said sentence,

It is ordered that said stay of execution be and the same hereby is granted, and bond fixed in the sum of $10,000.00.

Read, approved and signed in open court, whereupon court adjourned until March 20th, 1956, at 9:30 o'clock A. M.

(s) Clark J. Adams,
Circuit Judge.

Countersigned:

(s) Louis E. Fairbrother,
Deputy Clerk.

CERTIFICATE OF COPY OF RECORD BY COUNTY CLERK — In Chancery. 168

STATE OF MICHIGAN
SS.
COUNTY OF OAKLAND

I, Daniel T. Murphy, Jr., Clerk of the Circuit Court for the County of Oakland, in Chancery, the same being a Court of Record and having a seal, do hereby certify that I have compared the annexed copy of CR 15576, Clifford Dye Copy of Journal Entry dated March 19th, 1956 with the original record thereof now remaining in my office,

and that it is a true and correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Pontiac, this 10th day of September, 1959.

Daniel T. Murphy, Jr.,
Clerk.
By Margaret A. Mitchell,
Deputy Clerk.

(SEAL)

REMITTITUR FROM SUPREME COURT AFFIRMING JUDGMENT OF CIRCUIT COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 5th day of June in the year of our Lord one thousand nine hundred and fifty-nine.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
LELAND W. CARR
HARRY F. KELLY
TALBOT SMITH
EUGENE F. BLACK
GEORGE EDWARDS
JOHN D. VOELKER
THOMAS M. KAVANAGH,
Associate Justices.

Remittitur Affirming Judgment of Circuit Court

The People of the State of Michigan,
Plaintiff,
vs. 47401

Clifford B. Dye,
Defendant.

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Oakland, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Oakland be and same is hereby in all things affirmed.

STATE OF MICHIGAN — SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 9th day of September in the year of our Lord one thousand nine hundred and fifty-nine.

Donald F. Winters,
(SEAL) Clerk.
by JB.

SUPREME COURT ORDER DENYING MOTION FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 13th day of July in the year of our Lord one thousand nine hundred and fifty-nine.

Present the Honorable
JOHN R. DETHMERS,
Chief Justice,
LELAND W. CARR
HARRY F. KELLY
TALBOT SMITH
EUGENE F. BLACK
GEORGE EDWARDS
JOHN D. VOELKER
THOMAS M. KAVANAGH,
Associate Justices.

The People,
vs.
Clifford B. Dye 47401

A motion for rehearing having been heretofore submitted herein, it is hereby denied.

STATE OF MICHIGAN — SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of July in the year of our Lord one thousand nine hundred and fifty-nine.

Donald F. Winters,
(SEAL) Clerk.

FILE COPY

FILED
NOV 9 1959
JAMES R. BROWNING, Clerk

No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO A PETITION FOR WRIT OF CERTIORARI ALREADY FILED IN THE ABOVE ENTITLED CAUSE AND SUPPLEMENT TO A PETITION FILED OCTOBER 9, 1959 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO A PETITION FOR WRIT OF CERTIORARI ALREADY FILED IN THE ABOVE ENTITLED CAUSE

Now comes the above named Petitioner by Andrew J. Transue, his attorney, and moves this Honorable Court for leave to file a supplement to the petition already filed for writ of certiorari to the Supreme Court of the State of Michigan for the following reasons:

Since July 17, 1959, Petitioner, Clifford B. Dye, has been in the Michigan State Prison at Jackson, Michigan serving a sentence imposed upon him in the matter presented to this Court. Mr. Dye did not see the petition for writ of certiorari until after the same had been printed and filed. The following communication was received by his attorney, Andrew J. Transue:

"October 21, 1959

• • •

"Dear Mr. Transue:

"This is to confirm our telephone conversation of October 20.

"The following is the message I received 'Tell Transue that their argument (re "tainted testimony" by Clark in taking stand after case had been closed by both sides) overlooked Taylor's opening statement that "Mr. Clark thinks he knows which shot hit him *but he does not know*" (see appendix of Taylor's opening statement). This shows that Taylor knew that Clark's last testimony that 2nd shot hit him was false.' • • •

"Very truly yours,

"(s) M. Elizabeth McCall
"M. Elizabeth McCall,
"Secretary to Mr. Dye."

Petitioner also moves the Court for leave to supplement the petition already filed in regard to subdivision F thereof; that Rule 23, Subdivision 1(f) may be more precisely complied with.

Andrew J. Transue,
Attorney for Petitioner.

Richard C. Fruit,
Of Counsel.

No. 460

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

CLIFFORD B. DYE,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

SUPPLEMENT TO A PETITION FILED OCTOBER 9, 1959 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

QUESTION FOR REVIEW REFERRED TO AS QUESTION 3a FOR THE REASON THAT IT IS RELATED TO QUESTION 3 AND THE ARGUMENT MADE IN REGARD TO QUESTION 3 IS PARTLY APPLICABLE TO QUESTION 3a HERE SUBMITTED

3a. Where the Assistant Prosecuting Attorney, in his opening statement said (referring to the complaining witness, who was injured by being shot):

> "He seems to be quite sure as to which shot, fired at him, struck him, but he does not know * * *" (3a).

and the People's expert evidence shows that the gun was at least as close as 18 inches when Complainant Clark was shot (164a); and that the Assistant Prosecuting Attorney asked only the following questions of Complainant Clark on direct examination in the case in chief, and before the Defendant rested, in regard to the details of how Complainant was shot:

> "Q. Were you shot that day?
> A. Yes, sir.
> Q. By whom?
> A. Clifford Dye" (33a).

and then, after Petitioner testified that Complainant was accidentally shot (160a-161a) and in support of his claim of self-defense (St. Ct. 98a, 99a, 123a to 128a), and all the testimony in the case up to this point was consistent with Petitioner's claim of accident and self-defense; and then the Assistant Prosecuting Attorney recalled Complainant Clark in so-called rebuttal and brought out:

> "Mr. Dye reached his hand in his pocket and pulled out a gun and was playing with it or something and it went off in the ground. This was not minutes. This was seconds. He pulled the gun out and hit me in the stomach — eighteen feet apart. The next time he shot, the gun, he missed me by not over three feet, * * *" (127a),

did the Assistant Prosecuting Attorney intentionally and knowingly make an issue by false testimony?

ARGUMENT ON POINT 3a

The question submitted is a factual one and references to the record are made in the question itself in support of the Petitioner's contention that the Assistant Prosecuting Attorney, knowingly and intentionally used false testimony to make an issue for the jury and to obtain a conviction of Petitioner. In addition, when Complainant Clark was under cross-examination, and just as the Petitioner's attorney was starting to cross-examine Complainant Clark about how he was shot and the facts surrounding it, the Assistant Prosecuting Attorney said:

> "MR. TAYLOR: I was going to suggest at this time that we take the usual recess.
> THE COURT: We will recess for fifteen minutes" (43a).

After the recess, Petitioner's attorney then asked about the struggle between Petitioner and Complainant Clark, and Complainant Clark was asked:

> "Q. How did you have hold of Mr. Dye at the time he fell?

A. He had his hands up — by that time I had his hands up like this here. We went down together. We got tangled with the gate.

Q. You had hold of his wrists and as Mr. Dye fell, you fell on top of him or at the side of him, something of that nature?

A. Yes, sir.

Q. Was the gun discharged at that time?

A. No, sir. I couldn't say if it was. At that time that Mr. Dye and I fell, the gun was — we was on the ground" (41a).

The struggle was fifty feet or more from the point where Clark was when he first started to pursue Petitioner (St. Ct. 40a, and 40a and 126a). It occurred at a gate between the barnyard and Petitioner's house (See Exhibit 3, 5, 6 and 7, State Court Record, beginning at page 210a).

Mrs. Clark testified:

"Q. What was the position of the parties when the third shot was fired?

A. At that time I was so upset that I really only know just about what anyone would know in excitement as that but when the third shot was fired, they were either — it was the third or fourth shot because I am not sure how many shots. At that time they were tussling and they were back by the gate" (12a).

Mrs. Clark also testified:

"A. The last shot that was fired was when they were standing and they went to fall. The shot went off when they were standing or when they were falling, I couldn't — I mean, that's as near as I can tell you" (St. Ct. 53a).

The Assistant Prosecuting Attorney brought out from Complainant Clark on so-called rebuttal that Complainant Clark was shot when he had just come out of the barn and when Petitioner was standing at the corner of it as shown by Exhibit 3 (126a and St. Ct. 210a for the Exhibit 3); that Petitioner fired every shot that he fired when he

was standing in the same place (126a-127a). This, in spite of Clark's own testimony previously given:

> "Q. I am not asking you about when you were on the ground please. I am particularly concerned as Mr. Dye was in the process of falling.
>
> A. Falling to the ground?
>
> Q. Yes.
>
> A. When we was getting through that gate we got tangled up in the gate.
>
> Q. What happened then?
>
> A. We just went to the ground and Cliff was trying to get hold of the gun all the time. I finally got his arms up where I thought I could hold him until I got a few pains and I figured I was shot and I figured the best thing was to get out to there" (42a).

And he said:

> "Q. Was the gun discharged at that time?
>
> A. No, sir. I couldn't say if it was * * *" (41a).

All of the testimony at the close of the Defendant and Petitioner's case shows that there was a shot when the Petitioner and Complainant Clark were in a struggle up by the gate more than fifty feet from where they had started and to a point to where the Complainant Clark had pursued Petitioner; and all of the testimony shows that this is the shot that struck and injured the Complainant Clark. And it is with all of this knowledge and in this setting, including the statement which the Assistant Prosecuting Attorney himself made in his opening statement (referring to Complainant Clark):

> "He seems to be quite sure as to which shot, fired at him, struck him, but he does not know * * *" (3a),

all of which shows that the Assistant Prosecuting Attorney knew that the Complainant Clark was giving false testimony when he claimed he was shot when the Petitioner and Clark were 18 feet apart. This is vital testimony and this is the testimony that made an issue for the jury, as all of the other testimony was consistent with Petitioner's claim of accident and self-defense. The Minority Opinion

of the State Supreme Court shows that this was a very close case on the issue of self-defense with this testimony in:

> "Defendant pled self-defense and the burden of proof was upon the State to prove that it was not self-defense.
>
> "A grave and serious question as to whether the State had met this test was presented to the jury for determination. * * *" (165a).

Petitioner's present counsel did not represent Petitioner in the trial court. The argument here made is based on the record that we have.

The matters in the record that are set forth in support of question 3(a) and in the question itself, standing alone, would not have the probative force that they do have when the entire record is considered. The manner in which the case was tried and the unfair and prejudicial tactics of the Assistant Prosecuting Attorney and the ends that he went to in order to obtain a conviction, and when all of these matters are considered, then it is a reasonable conclusion that when the Assistant Prosecuting Attorney recalled Complainant Clark for so-called rebuttal, he knew that he had been told by Complainant Clark that he, Complainant Clark, did not know which shot hit him. But he was willing for Clark to take the witness stand and for him to say positively that he, Clark, was shot down behind the barn when he was 18 feet away from the Petitioner by the bullet after the first one that was fired from the gun.

The Assistant Prosecuting Attorney put Complainant Clark on the witness stand in so-called rebuttal and brought out positive testimony from Clark as above set forth, when he knew he had been told differently by Clark, when he knew that Clark had testified differently, when he knew that Clark's wife had testified differently, and that the Petitioner had testified differently, and, more than that, when he knew that his own witness, the police expert, said that the shot that injured Complainant Clark was fired within 18 inches from the end of the gun barrel; and the Assistant Prosecuting Attorney knew that the only time Complainant Clark and Petitioner were that close together was

up by the gate, fifty feet or more away from the place where Clark said he was shot in his so-called rebuttal testimony.

That knowing use by the state officials of perjured testimony, is want of due process, is shown by cases cited on page 33 of the original petition; and, particularly, the extensive annotation at 2 *L. Ed.* (2d) 1575, which cites many cases where the Federal Courts have given relief against state court convictions. Also, the case of *Edward Eckwerth, Petitioner vs. The People of the State of New York*, 3 L. Ed. (2d) 925, decided April 20, 1959, where Mr. Justice Harlan said:

> "I have now considered the papers submitted by the State which, I regret to say, included no memorandum or affidavit in opposition. Fully recognizing the shocking character of this crime, I nevertheless consider it my duty to grant petitioner's application. In light of the flat and unexplained contradiction relating to the episode of the dead woman's shoes between, on the one hand, the stenographer's minutes of the District Attorney's interrogation of petitioner on August 25, 1956, and Dr. Bradess' testimony and the District Attorney's summation, on the other hand, I cannot say that the petition for certiorari is so clearly devoid of a possible federal question that I should allow this man to go to his death before the Court has had an opportunity to consider his petition for certiorari, to which the State has not yet responded. The State's response is due May 4, 1959.
>
> "Accordingly, petitioner's execution will be stayed pending this Court's disposition of the petition for certiorari."

In the case at bar the Petitioner is a lawyer serving prison sentence and disbarment proceedings have been instituted against him.

SUPPLEMENT TO SUBDIVISION F OF THE PETITION ALREADY FILED

To more precisely comply with Subdivision 1(f) of Rule 23, the following is set forth in supplement of F in the petition now on file:

1. The stage in the proceedings in the Court of the first instance and in the Appellate Court at which and the manner in which the federal question sought to be reviewed by question one was raised, and passed on are:

Objection to testimony concerning a claimed felonious assault by Petitioner about three years previous, on rebuttal, was raised in the trial court, and overruled (133a-134a) in front of the jury.

The general objections against Petitioner's claim of repeated injection of prejudicial and collateral matters and innuendo were raised under paragraph 3(a) of the motion for new trial, appended to this amended petition.

Assignments of error have been abolished in Michigan: *Honigman's Michigan Court Rules*, (pocket supplement), comment on Rule 67; so that the points are raised by the Appellants' briefs in the Michigan Supreme Court.

Following is from Petitioner's Statement of Questions involved, in the Appellant's brief in the Michigan Supreme Court:

> "II.(a) Was the conduct of the Assistant Prosecuting Attorney unfair, improper, and prejudicial so as to constitute reversible error?
>
> "(b) Did the Court err in failing to hold the Assistant Prosecuting Attorney in check in the matters referred to in question (a)?
>
> "(d) Did the Court err in overruling the Respondent's request that a mistrial be declared?"

The last refers to a general motion for mistrial because of the prejudicial matter consistently introduced (76a).

This specific point was discussed on pages 69-76 of Appellant's brief in the Michigan Supreme Court, one copy of which has been filed with this Court ("previous gunplay").

As to this, and other collateral and prejudicial matters, the following is quoted from the motion for rehearing, in the Michigan Supreme Court, one copy of which was filed with this Court; and which motion was denied without opinion. The following appears at the end of the motion for rehearing:

> "For the reasons stated herein we submit the defendant was not accorded a fair and impartial trial in accordance with his guarantees under the Fourteenth Amendment of the Constitution of the United States of America, and we therefore respectfully request this Honorable Court to pass on this issue."

Under point III of the motion for rehearing, counsel said:

> "We respectfully submit that in holding that the respondent had a fair and impartial trial this court was under a misapprehension as to the facts and also misapplied the law,"

quoting the dissenting opinion, and citing at length prejudicial errors, along the lines set forth under points I and II of the Argument herein (pages 9-28 of the motion for rehearing).

The opinion of the minority on the injection of collateral and prejudicial matters, is set forth on page 8 of the Petition. The opinion of the majority of the Court, as to points 1 and 2 hereof, was (155a):

> "Although there is much in the transcript that might well have been omitted, we do not feel that the uncalled for matter in any way prejudiced the Defendant."

Objection was made in the trial court, and overruled, concerning the charge against the Petitioner of a collateral matter, to-wit: fraud on the Michigan Supreme Court in his application to practice law in the State of Michigan; when Mr. Dye was first questioned about it (113a); and, again, in connection with the rebuttal testimony of Donald F. Winters, Clerk of the Michigan Supreme Court, upon the offering of a letter, objections were made and

overruled, and the letter was received in evidence (119a). Subsequent objections and the rulings thereon in the trial court are shown in the Appellant's brief in the Michigan Supreme Court, pages 82-84. The manner in which the questions were raised in the Michigan Supreme Court is by questions set forth in the brief, which now take the place of assignments of error in Michigan practice.

The accusations of forgery were discussed on page 58 of Appellant's brief in the Michigan Supreme Court, and on page 83 of his Reply Brief in the State Supreme Court, and were disposed of as shown above.

The gun-in-brief-case point was discussed in the Appellant's Reply Brief in the Michigan Supreme Court, pages 90-91; and disposed of as indicated above.

2. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question two were raised and passed on are as follows:

The argumentative nature of the Assistant Prosecutor's opening statement was objected to, (4a) and the Court gave an admonishment. For the most part, objection was made to the Assistant Prosecutor's opening statement and the testimony offered to substantiate it at the time the testimony was offered.

The introduction of the gun permit to prejudice the Petitioner and to show by innuendo that he was either insane or had a criminal record was objected to, and a specific motion made for a mistrial (76a). It was discussed on pages 67,68 in the Appellant's brief in the State Supreme Court; and the disposition of this objection was as indicated in the manner herein set forth in regard to question number one.

Objections were made concerning Florida real estate (86a-90a); no ruling was made, but the question was withdrawn. Objections to these insinuations appear on pages 61-64 of Appellant's brief in the Michigan Supreme Court; and the motion for new trial, and the opinions of the Supreme Court, and the Motion for Rehearing were as discussed under question one above.

The question as to Petitioner's financial solvency was asked several times (89a-91a); and each time a ruling was made that the matter was irrelevant. This was discussed on page 63 of Appellant's brief in the Michigan Supreme Court, and the motion for new trial, and disposed of in the appellate court as discussed under question one herein.

The leading question to Reginald Crawford was objected to in the trial court (28a) and the jury told to disregard it.

The settlement between Complainant and Petitioner, so far as reading the decree was objected to (20a), and overruled (21a), and subsequent objections and rulings were as indicated under question one.

Reading the pleadings in the assault case was objected to in the trial court (26a), and overruled (26a). This was disposed of subsequently as indicated under question one.

The size of the milk check was objected to (94a) and the objection overruled (94a); and the matter was discussed as one of the "facts", in the majority opinion (the increasing size of the check, 151a).

The subject of Petitioner's prior marriages was brought up early in the trial (8a), and ruled irrelevant (8a). The same subject, objection and ruling, appear (69a). But the Court permitted the bill of complaint in a divorce case to be introduced over objections (82a-83a). Petitioner raised this in his brief in the Michigan Supreme Court, pages 54-63, 69; and it was disposed of as indicated under question one above.

As to Petitioner allegedly making no statement to the police, it was objected to as prejudicial (61a). The Court ruled that his failure to testify could not be commented on (62a); as it actually was; but it is not clear that he meant alleged failure to make a statement to the police. Objections were made to questioning of witness Bremer as to the significance of making statements to the police, and after objections, it was withdrawn (56a).

Petitioner objected to reflections on his alleged treatment of colored people in Appellant's brief in the Michigan Supreme Court, pages 78, 88. He also objected, in his Appellant's brief in the Michigan Supreme Court, pages 64-65, 87, 92, to reflections upon his professional

ethics; and to being referred to as "Lawyer Dye", Appellant's Reply brief in the Michigan Supreme Court, page 87.

The question that he had an alleged persecution complex, was objected to (96a). Points covered by this and preceding paragraph were to some extent discussed in the minority opinion; but disposed of as indicated at the beginning of question one herein.

The question about "I am the Law, Dye" was discussed in Appellant's brief in the Michigan Supreme Court, pages 70-71, and the minority opinion (165a) but disposed of by the majority as indicated above.

3. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question three were raised and passed on are as follows:

The question of the testimony as to the details of the shooting, including recalling Clark on rebuttal, was raised by a motion for directed verdict, at the close of the People's case (50a). It does not appear in full, but the following is taken from the Transcript (page 298ff):

> "• • • (the testimony) leaves us in the position where the only shot which could have caused the injury • • • came from Mr. Dye's gun while Mr. Clark had hold of his arms or hands."

It was again raised by the motion for new trial (paragraph 3a). 3 E

3a. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question three-a were raised and passed on are as follows:

The question of recalling Clark on rebuttal and a discussion of the Assistant Prosecuting Attorney's opening statement in regard to this testimony was set out at length in Appellant's Reply Brief in the Michigan Supreme Court, pages 56-57. The minority of the Court discussed the question of self-defense, as set forth in page 8 of the petition. The majority said there was sufficient evidence to support a verdict, and to deny the motion for di-

rected verdict (154a). The facts were again discussed in the motion for rehearing in the Michigan Supreme Court, one copy of which has been filed, on pages 2-8. This motion was denied without opinion.

4. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question four were raised and passed on are as follows:

Evidence of Petitioner's knowledge of prior violent acts by Clark, which had come to him from third parties, was offered and excluded (59a-60a). It was raised by paragraph 3 (a) of a motion for a new trial and on page 98 of Appellant's brief in the Michigan Supreme Court and page 100 of his Reply Brief in the Michigan Supreme Court, and pages 21-22 of the motion for rehearing in the State Supreme Court. As discussed on page 36 of the Petition filed, the majority of the State Supreme Court tacitly admitted that this was an error (155a).

5. The stage in the proceedings in the trial court and the appellate court at which and the manner in which the federal question sought to be reviewed by question five were raised and passed on are as follows:

A request to charge on the subject of self-defense appears in the State Court Appendix, page 216a, and this was one of the bases for the motion for new trial, paragraph 3 (d) appended hereto. This was discussed in the brief of Appellant in the Michigan Supreme Court, pages 98-117 and page 102 of the Reply Brief in that Court, including the law as to self-defense, and pages 24-28 of the Motion for Rehearing, which was denied without opinion. The charge given, as to self-defense, appears (144a-145a). The whole charge is found at page (135a). The majority of the State Supreme Court held that the charge was, as a whole, adequate (156a).

Other prejudicial and collateral matters, and innuendo, injected by the Assistant Prosecuting Attorney, too numerous to classify and discuss, appear in the appendix to the originial Petition. The fundamental question of whether Petitioner received a fair trial was raised and disposed of as set forth under question one hereof.

The sufficiency of raising the federal question, as a matter of law, is discussed on pages 39-41 of the original Petition.

Respectfully submitted,

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MOTION TO SET ASIDE CONVICTION AND SENTENCE AND GRANT DEFENDANT A NEW TRIAL

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 15576

CLIFFORD DYE.

Now comes Clifford Dye, defendant herein, by Clarence L. Smith, his attorney, and petitions this Honorable Court for an Order Setting aside the Conviction of said Defendant and Granting him a New Trial. In support of this petition, the following representations are submitted:

1. That claims of error in this petition are presented without the benefit of the transcript of testimony, but it is further represented that such testimony has been ordered and the court reporter's certificate, certifying the order of such transcript, was made as of March 8, 1956 depicting the order as of March 6, 1956.

2. That the defendant was found guilty by the verdict of a jury on March 1st, of the crime known as Assault with intent to do Great Bodily Harm, less than the Crime of Murder.

3. That from the memory and information Counsel now has, it is claimed that the following errors were committed in the trial of said cause, effecting a miscarriage of justice and a failure to afford the defendant a fair and impartial trial, in that:

(a) Under plea of self-defense, the Court refused to permit the defendant to recite in evidence various incidents of violence and brutality on the part of the complaining witness, which incidents were known to the defendant at the time of the alleged crime, by virtue of communications to the defendant by third parties, as distinguished from com-

munications to the defendant by the complaining witness himself or by direct observation of the defendant.

(b) That notwithstanding the extensive nature of the trial, extending in the point of time from February 15th to March 1st, the extensive nature of arguments by Counsel for the People And for the Defendant, extending for a period well in excess of four hours, that nevertheless, the Court did, before permitting the jurors to retire, instruct such jury in substance and effect, that they ought to pay proper respect to each other's opinions, and listen with a disposition, to be convinced to each other's arguments, and that the minority ought seriously to ask themselves if their doubts were reasonable and to concur with the majority if they could conscientiously do so.

(c) That throughout said trial, the Assistant Prosecutor made inferences and insinuations tending to prejudice the jury against the respondent, and that in at least two such instances, namely "Isn't it true that you have had five wives?" and in another instance, "Isn't it true that Dr. ..... certified that in a Probate Proceeding that you were suffering from hallucinations?"

(d) That the Court erred in his instructions by failing to give the defendant's theory of his defense as requested, and substituting therefore the Court's wording, which omitted any reference to the theory of self-defense as applied to the third and fourth shots involved in the evidence presented.

(e) That the verdict of the jury was against the great weight of the evidence, particularly in view of the State's testimony that the shot which struck the complaining witness must, of necessity, be fired from a gun shot not more than 18 inches from the complaining witness at the time, whereas the complaining witness testified that he was deliberately shot at a distance of 18 feet, and the complaining witness' wife testified that shots one, two, and

three were from distances of approximately 15 feet, and where the only evidence of any shot within 18 inches came from the testimony of the complaining witness' wife, who testified that shot number four was fired when the defendant was falling to the ground with the complaining witness holding the defendant's hands or arms at the time. The only other testimony on the subject was that the defendant himself, who testified that the fourth shot must have been the shot that struck the complaining witness, that the gun was fired while the complaining witness held the defendant's hand and as both parties fell to the ground, and at the moment the defendant, himself, struck the ground. There is further instance of testimony bearing on the question of a jury arrived at their verdict, which involved specific intent, attention was called to the testimony given by the defendant, and supported by Mrs. Clark, that immediately after the fourth shot, the complaining witness, for the first time, gave expression to the fact that he had been shot, and that the defendant then said in substance, "You are shot, I'll take you to the hospital." As a further incident bearing on the question of specific intent, the undisputed testimony is that from the time of the inception of the difficulties to the time of the final shot, the complaining witness traversed a distance from the southeast corner of the barn, to the northwest corner of the barn, and that at least the distance from approximately mid-way between the southeast corner of the barn and the northeast corner of the barn, to the point of the final shot outside the gate, was made in pursuit of the defendant by the complaining witness.

This motion is based upon the records and files in this cause and on the Affidavit of Clarence L. Smith, hereto attached.

(s) Clarence L. Smith,
Attorney for the Defendant.